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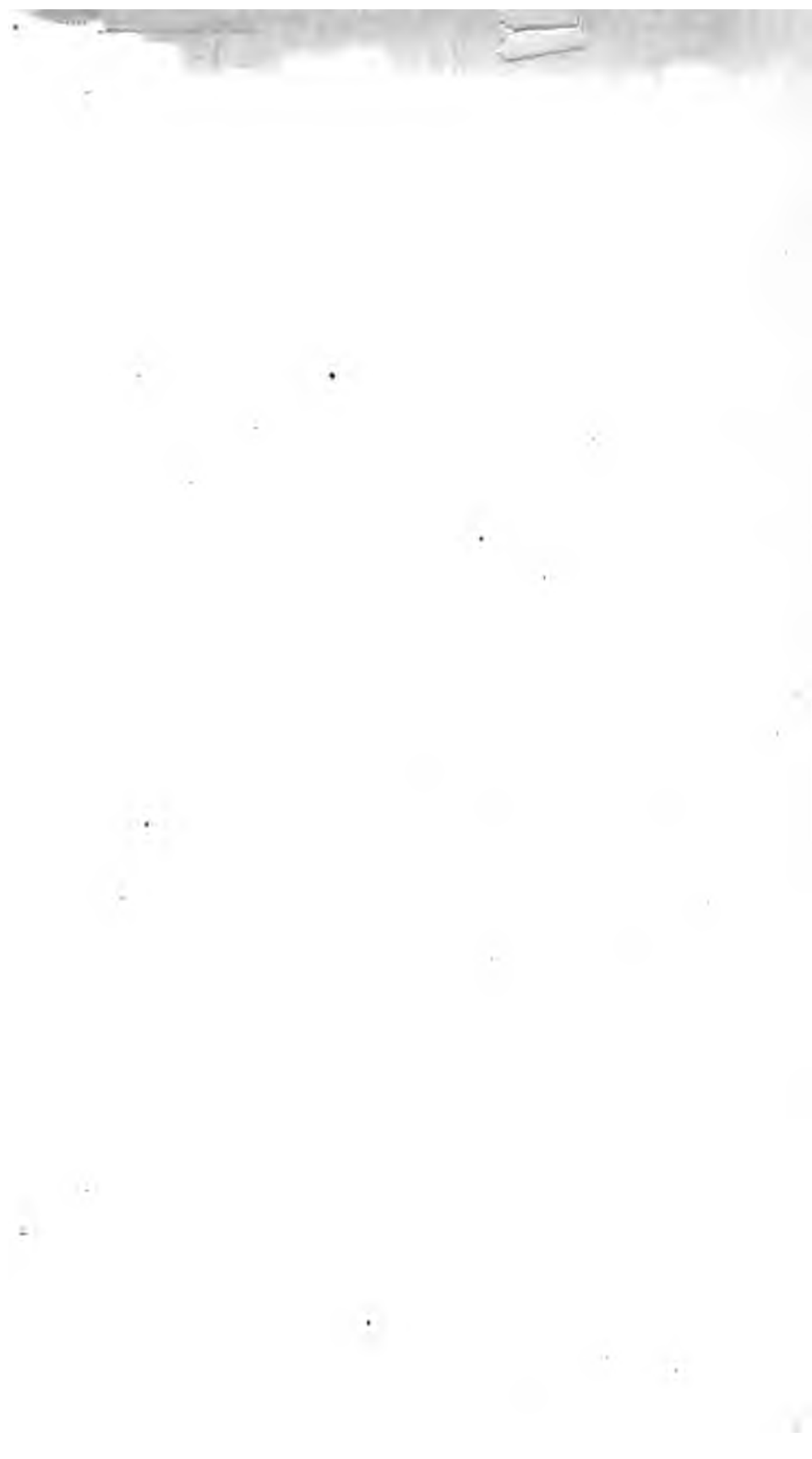
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

REPORTED BY
WILLIAM B. WOODS,
THE CIRCUIT JUSTICE.

VOLUME IV.

CHICAGO:
CALLAGHAN AND COMPANY,
LAW BOOK PUBLISHERS.
1883.

Entered according to Act of Congress in the year eighteen hundred and eighty-three,
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JUDGES
OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT,
DURING THE TIME OF THESE REPORTS.

HON. JOSEPH P. BRADLEY, Circuit Justice.
HON. WILLIAM B. WOODS,¹ Circuit Justice.
HON. WILLIAM B. WOODS,¹ Circuit Judge.
HON. DON A. PARDEE, Circuit Judge.

DISTRICT JUDGES.

HON. JOHN ERSKINE, Districts of Georgia.
HON. HENRY K. McCAY,² Northern District of Georgia.
HON. THOMAS SETTLE, Northern District of Florida.
HON. JAMES W. LOCKE, Southern District of Florida.
HON. JOHN BRUCE, Districts of Alabama.
HON. ROBERT A. HILL, Districts of Mississippi.
HON. EDWARD COKE BILLINGS, District of Louisiana.
HON. ALEXANDER BOARMAN,³ Western District of Louisiana.
HON. AMOS MORRILL, Eastern District of Texas.
HON. EZEKIEL B. TURNER, Western District of Texas.
HON. ANDREW P. McCORMICK, Northern District of Texas.

¹ Judge Woods was appointed, December 21, 1880, an associate justice of the supreme court of the United States. He took the oath of office January 5, 1881, and was assigned to the fifth circuit. On May 18, 1881, Mr. Don A. Pardee was appointed circuit judge for the fifth circuit.

² By an act of congress passed April 25, 1882, the president was authorized to appoint a district judge for the northern district of Georgia, and Judge Erskine was assigned to the southern district. Mr. Henry K. McCay was appointed, August 4, 1882, district judge for the northern district.

³ By an act of congress passed March 8, 1881, the state of Louisiana, which at that date constituted the district of Louisiana, was divided into two districts, the eastern and western. Judge Billings continued in office as the district judge for the eastern district. Mr. Alexander Boarman was appointed, May 18, 1881, district judge for the western district.

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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

DISTRICT OF LOUISIANA.

APRIL TERM, 1878.

NEW ORLEANS, M. & C. RAILROAD COMPANY V. THE CITY OF
NEW ORLEANS.

1. If the decree of a court is free from ambiguity it speaks for itself, and cannot be qualified by the opinion of the court by which it was preceded.
2. The rights of the parties in reference to certain property having been settled by the final decree of the court of last resort, such decree will, in a subsequent litigation between the same parties in reference to the same property, be considered as *res judicata*.

IN EQUITY.

Messrs. John A. Campbell and A. Micou, for complainants.

Messrs. B. F. Jonas, City Attorney, and *W. W. King*, for defendant.

BILLINGS, District Judge. This is a cause which was commenced in the superior district court of the parish of Orleans, and has been removed from that court to this. In this court, from its nature, it stands as a chancery suit.

Complainant alleges that in the year 1874 the city authorities (the defendant) sent a large force to beat down the walls.

New Orleans, etc., Railroad Co. v. New Orleans.

of a freight depot belonging to it. As an incident of the suit, the complainant obtained an injunction in the superior district court, *pendente lite*, and the object of this suit is to perpetuate that injunction. The mischief is of such a character as to make the case fall within that class of cases which justifies the interposition of the courts of chancery.

The basis of the suit as set up in the petition of the complainant — now to be treated as a bill in equity — is a judgment of the supreme court of the state of Louisiana between the same parties contained in the record — No. 3692 of that court.

On the other hand, the defendant sets up a final decree rendered in the supreme court of the state of Louisiana, also between the same parties, in a case known as No. 3701 of the docket of said court. An inspection of the record in this case discloses the fact that the complainants had, partly by purchase from private owners and partly by a grant of the legislature, obtained two sets of rights with reference to certain squares of ground in the city of New Orleans, provided that the grants of the legislature were valid, and that the same series of acts of the legislature had given them also the right of way, and the right of putting down tracks and erecting depots upon these squares, as incidents of their right of way as a railroad.

The first right which was claimed was that "the complainants had acquired the fee to the land" in dispute; or, rather, the precise question was whether the fee was in the defendant or in the public. In the second suit they claim rights with reference to their right of way, viz., their right of way, with their right to put tracks upon the land, and to maintain buildings for depots. In both of these suits the lower court, which was the superior district court, had given judgment in favor of the complainants, maintaining thereby, in the one, the rights of the company as owners of the fee, and, in the other, their right of way, and the incidents with reference to tracks and depots.

1. With reference to the *fee*. In the twenty-sixth volume

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of the Louisiana Annual Reports, 478, the docket number being 3701, the supreme court rendered a decree annulling the judgment of the eighth district court, and dissolving the injunction which had been issued by that court, and giving judgment for the city of New Orleans, maintaining the reconventional demand of the city, and restraining the plaintiffs from occupying the property in controversy.

Upon a rehearing, at page 485, the court modified their judgment as follows:

“In our opinion the injunction improperly issued in this case; but, as the city has made no claim against the plaintiffs, our former decree was erroneous in granting the demand in reconvention, and inhibiting the plaintiffs from occupying the property in controversy. Under the pleadings, all we can do is to render judgment in favor of the city, dissolving the injunction and dismissing the plaintiffs’ suit, leaving the parties to their rights under the laws relative to the expropriation of property.”

Then follows the final decree in the cause, as follows:

“It is therefore ordered that our former decree be set aside, and it is now ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant, the city of New Orleans, dissolving the injunction herein, and dismissing the plaintiffs’ suit, with costs in both courts, without prejudice to the rights of both parties under the laws of expropriation.”

2. As to the rights of the complainants which sprang out of the grant to them of the right of way and its incidents. In this case there was also a judgment in the eighth district court in favor of the complainants, and an original hearing and rehearing in the supreme court. Upon the first hearing, Judge Wiley, in the case known as No. 3692, thus states the question in rendering the majority opinion, at page 517:

“This controversy arises out of the acts of the 19th of March, 1868, the 17th of February, 1869, the 21st of February, 1870, granting to the complainants for passenger and freight depots a space of ground. . . . Also granting

the right to lay tracks, and occupy as a railroad, a strip of land extending down the levee to Elysian Fields street."

He then quotes a paragraph of the answer of the city, which in substance is that the use of that part of the batture for a railroad, and the enjoyment of the privileges granted by the legislature, would prevent its use as a *locus publicus*, and highway.

Chief Justice Ludeling, at page 524, in his dissenting opinion at the first hearing, states the question thus: "The question involved in this case is simply whether or not the legislature can control the public quay or levee of the city of New Orleans without the consent of the city."

Upon the rehearing, at page 529, the majority opinion is rendered by Judge Morgan very briefly as follows: "The sole question presented in this case is, has the state the power to grant to a railroad company the right of way through the streets of this city? A thorough examination of this question has led us to the conclusion that it has." And then follows the decree: "It is therefore ordered, adjudged and decreed, that the judgment heretofore rendered by us be avoided, annulled and set aside, and it is now ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs."

If we turn to the decree of the district court as found in the printed record put in evidence, at pages 255, 256, we find it decreed that "the defendants be enjoined, prohibited and restrained from, in any manner, interfering with or obstructing said plaintiffs in constructing or maintaining its railroad upon and on the levee, streets and batture described and designated in the acts of the general assembly granting such rights and privileges to said company, and by the maps filed with the secretary of state and with the mayor of the city of New Orleans." They dismiss the reconventional demand of the city, and maintain the validity of the acts of the general assembly granting to the complainants the right to construct, maintain and use its track, turn-outs, switches, depots, etc., along and upon the levee, streets and batture in

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front of the city of New Orleans. And this judgment, by the final decree of the supreme court, was in all respects affirmed.

There is no doubt but that if a decree is free from ambiguity, it speaks for itself, and cannot be qualified by the opinion by which it may have been preceded. *Plicque v. Perret*, 19 La., 318; *Keane v. Fisher*, 10 La. An., 261; *Trescott v. Lewis*, 12 La. An., 197; *Succession of McDonough*, 24 La. An., 34; *Washington, etc., Steam Packet Co. v. Sickles*, 24 How., 333; *Smith v. Kernochen*, 7 How., 199. But I think that a careful analysis of the opinions, and of the decrees, shows that there is no ambiguity in either of the decrees, and that they are rendered in accordance with the opinions which, at the last, the supreme court formed. What the court meant to adjudge is also made manifest by what they say in the case of the city against complainants (27 La. An., 415), which was a case with reference to the power of the legislature to exempt complainants from wharfage dues. The court say (page 415) the grant was the control by the legislature of a public servitude.

Certainly this is true to the extent to which the injunction asked for in this cause goes, and it is only to that extent that the matter is involved. In the cause No. 3701, which was first heard and disposed of, the supreme court had settled the question that the fee to that portion of the batture upon which this property was located was in the city of New Orleans, and in their decree upon the rehearing they maintained that view without change, amending their decree only so far as related to the reconventional demand of the city.

The matter involved in cause No. 3692, at page 517, was, as I have stated,—conceding that the fee of the property was in the city, subject to the servitude which the public had, it being a quay or levee,—whether it could be controlled by the legislature without the consent of the city so far as to allow the plaintiffs their right of way, their tracks and depots; and it is clear that, comprehending fully the meaning of their decree, they had at last come to the con-

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clusion that the legislature could so control a public place; for Judge Wiley, at page 529, in his brief dissenting opinion, says he "concurs that the state can grant the right of way," but dissents from the conclusion of the majority of the court, because the company could only get the land necessary for tracks and depots by expropriation or purchase.

I do not say that this last decree is such a decree as I should have rendered, but I find it free from all ambiguity, and that it is manifest, by the opinions that preceded it, that the supreme court of the state intended to render just such a decree as the words used import; certainly, to the extent of giving the complainants the right which in this suit they ask to have protected.

This being my conclusion, it is my duty to treat the matter presented as a thing adjudged. Let there be a decree perpetuating the injunction, so far as it relates to matters included in this opinion.

NOVEMBER TERM, 1879.

STEPHEN PERCY ELLIS ET AL. V. JEFFERSON DAVIS.

1. The circuit court of the United States for the district of Louisiana has not original jurisdiction of a bill filed by the heirs at law of a testator, to set aside a decree of the probate court of the parish of Orleans, admitting a will to probate and record, and recognizing the legatee therein named as the testator's sole and universal legatee.
2. The case of *Broderick's Will*, 21 Wall., 508, followed, and the case of *Gaines v. Fuentes*, 92 U. S., 10, distinguished.

IN EQUITY. Heard on demurrer to the bill.

The bill was filed by the complainants as heirs at law of Mrs. Sarah Ann Dorsey against Jefferson Davis. The case stated by it was substantially as follows: The defendant Davis was a citizen of the state of Mississippi, the complainants were citizens of other states. Mrs. Dorsey died on July 4,

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1879, seized and possessed of lands and tenements situate in the states of Mississippi, Louisiana and Arkansas, and on her death her entire estate, movable and immovable, became vested in the complainants and J. Adolphe Dahlgren and Mary Ellis as her sole heirs at law.

On May 10, 1879, Mrs. Dorsey by notarial act had constituted the defendant, Jefferson Davis, her agent and attorney in fact for the management of her estate and property, with full power to sue and be sued in her name, to lease, alienate and encumber her real estate, and to purchase real estate and to borrow money and execute notes in her name.

The defendant, by virtue of said procuration, had taken possession and control of all the estate and property, deeds and account books of Mrs. Dorsey, and managed the same until her death; and since her death, and up to the time of the filing of the bill, had continued such possession and control, and had refused, and still refuses, to render to complainants any account of his agency.

In order to wrong and injure the complainants, heirs of Mrs. Dorsey, and prevent them from obtaining possession of said property so in his possession and control, the defendant pretends that Mrs. Dorsey, by her last will, devised and bequeathed to him all of her said property, and threatens to set up said will in any suit at law or in equity which complainants may bring for the recovery of said property.

The bill then sets out *in hæc verba* the alleged will of Mrs. Dorsey, which purported to give and bequeath all her property, real, personal and mixed, wherever located, wholly and entirely, without hindrance or qualification, to the defendant, who is described as "my most honored and esteemed friend, Jefferson Davis, ex-President of the Confederate States, for his own sole use and benefit in fee simple forever." The will contained the following clause:

"I do not intend to share the ingratitude of my country towards the man who is in my eyes the highest and noblest in existence."

The bill denied that said instrument was the last will and

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testament of Mrs. Dorsey, and alleged that the same was null and void for the following reasons:

1. That previous to and at the time of writing and signing the same, said Sarah Ann Dorsey was not of sound and disposing mind.

2. That the same was written and signed by her when under the undue influence of said defendant, and which said undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influence.

“3. That the motive and objects inducing and controlling said testatrix to make said bequest to defendant, as well as said bequest itself, were, under the law of the land, illegal, null and void.”

“Under the circumstances aforesaid” the complainants insisted “said pretended will, and especially the bequests therein to defendant, are and should be held null and void, on account of the testatrix being, at the time of writing and signing the same, not of sound and disposing mind, and under said undue influence, and the illegality of said bequests.”

The bill further averred that the defendant, by an *ex parte* proceeding before the second district court of the parish of Orleans, in the hope of making said pretended will more effective as a muniment of title and bar to the rights of complainants, had procured the probate and record of the same as the true and valid last will and testament of the said Sarah Ann Dorsey, and obtained an order that, as sole and universal legatee of the said Sarah Ann Dorsey, he be put in possession of all the property, real, personal and mixed, left by her, and wherever situated; that upon the conclusion of said proceedings the second district court ceased to have any further jurisdiction over said succession; that said proceedings and orders of the second district court, though not *res adjudicata* against complainants, yet so long as said will and the probate thereof should remain unannulled, would constitute a muniment of title in defendant to the

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estate of Mrs. Dorsey; that the testimony submitted to the second district court to prove that Mrs. Dorsey, at the time of the execution of said pretended will, was of sound mind, was untrue, and if true, insufficient; that the defendant claims title to the property of Mrs. Dorsey, known as Beauvoir, in Harrison county, Mississippi, by virtue of a deed for the same, executed and delivered to him by Mrs. Dorsey on February 19, 1879. The bill charged that said deed was null and void, because at the time of its execution Mrs. Dorsey was not of sound mind; that it was executed by her when under the undue influence of the defendant; and that the motives which induced her to make said conveyance were illegal; and that under said agency of May 10, 1878, the defendant had no legal right to purchase any part of the property over which his agency extended; that his consent to the sale of the property to himself without security for the payment of the purchase price, and at a sum below its value, was a violation of the trust assumed by him as agent; and for these reasons the act of sale should be canceled and annulled.

The bill further charged that owing to the complicated character of the agency created as aforesaid by the act of May 10, 1878, an account of the same could not be properly taken except in a court of equity.

The prayer of the bill was that the alleged will of Sarah Ann Dorsey be canceled and annulled as absolutely void; that the decree of probate thereof, and the decree recognizing the defendant as sole and universal legatee of Mrs. Dorsey, and ordering him to be put in possession of all her property, be canceled and recalled as absolutely null and void; that the alleged sale and conveyance to the defendant by Mrs. Dorsey, of the property known as Beauvoir, in Harrison county, Mississippi, of February 19, 1879, be canceled and annulled as absolutely null and void, in so far as either said will, decree of probate, decree of possession, or said sale could "in any manner be pleaded by defendant as recognizing him as testamentary heir and universal legatee of said

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Sarah Ann Dorsey, or as a muniment of title or legal bar against complainants or their co-heirs as her legal and sole heirs, and as such entitled to the ownership and possession of all the property belonging to her estate, and which in any manner has come into the possession of defendant either as agent or trustee," and that the defendant be decreed to come to a full and fair account of all his actions and doings under said act of procuration of May 10, 1878, and that he furnish the court with a statement of all the property lately belonging to the said Sarah Ann Dorsey which had come into his possession as her agent or by virtue of said alleged will or the decrees of said probate court; that he be decreed to surrender to complainants, and if so desired by them, jointly with their co-heirs, the possession of all said property, including all books, papers, title deeds, etc., belonging to said estate, which have come into his possession since May 10, 1878, and that he be enjoined from setting up and pleading said alleged will or said decrees of the probate court as against the complainants as next of kin and legal heirs of said Sarah Ann Dorsey.

The defendant demurred to the bill because the cause of complaint therein set forth was within the exclusive jurisdiction of the second district court for the parish of Orleans, and not within the jurisdiction of this court.

The defendant also demurred to so much of the bill as sought to have said will, and the decrees of the second district court admitting the same to probate, canceled and annulled on the ground of undue influence, or of mental unsoundness, and of the illegal motives which induced the testatrix to execute said will; and to so much of the bill as sought, on the grounds set out in the bill, to set aside the conveyance by Mrs. Dorsey, to defendant, of the property known as Beauvoir.

Mr. Wm. Reed Mills, for complainants.

Messrs. Charles E. Fenner, Edgar H. Farrar and C. L. Walker, for defendant.

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Woods, Circuit Judge. It is clear that unless the will of Mrs. Dorsey, and the decrees of the second district court of the parish of Orleans admitting it to probate and declaring the defendant to be the sole and universal legatee of Mrs. Dorsey, can be successfully attacked in this court, the court cannot grant any of the relief prayed for by the bill. For as long as the will and decrees referred to remain in force, the complainants cannot call upon the defendant for an account touching property of which the will makes him the absolute owner, and deprives them of any interest therein or in its proceeds, nor are they in any position to demand the revocation of the deed made by Mrs. Dorsey, to defendant, for the property known as Beauvoir; for if the deed is not good, the property belongs to the defendant by virtue of the will. In a word, the will, as long as it remains in force, strips them of all interest in the affairs and property of the testator. It is no concern of theirs how the defendant has managed the property, or whether the deed to Beauvoir be valid or invalid.

Therefore the demurrer based on the ground that this court had no jurisdiction of the matters set forth in relation to the will and its probate reaches the whole case.

The statement of the averments of the bill above given shows that the suit is brought by the heirs at law of Sarah Ann Dorsey, in this court, against Jefferson Davis, to annul a decree of the probate court of the parish of Orleans establishing the will, and declaring the defendant, under its provisions, to be the testamentary heir and universal legatee of the testator. The grounds on which this relief is prayed are, that said testator was not of sound mind, and was under the undue influence of the defendant when she made her will, and that the motives which induced her to make her will in favor of defendant were illegal and against public policy.

The case made by the bill, so far as the question of jurisdiction is concerned, is in all material respects the case made by complainants in the case of *Broderick's Will*, 21 Wall.,

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503. In that case the bill was filed by persons who claimed to be the heirs at law of Broderick.

It was filed on December 16, 1869, and stated that Broderick died September 16, 1859, intestate, seized of real estate and possessed of personal property of large value, and that on February 20, 1860, the defendant McGlynn presented to the probate court of San Francisco, a paper writing purporting to be the last will and testament of Broderick, but which was in fact a forgery, and that the person presenting it, and the persons on whose behalf it was presented, knew it to be a forgery, and that by means of false and perjured testimony, the said court was induced to admit to probate and record the said paper writing as the genuine last will and testament of said Broderick. The bill prayed that the will might be declared a forgery; that the probate and all subsequent proceedings might be set aside; that the defendants, who had purchased lands under order of sale made by the court on the application of the executor of said pretended will, might be declared trustees for the complainants and might be compelled to convey to them.

The complainants alleged that they never resided in California or the United States; never heard or had any opportunity of hearing of Broderick's death, or of the probate of his pretended will, until more than eight years after it had been filed for probate, they being illiterate and residing in a remote and secluded region of Australia.

The bill was demurred to and dismissed by the circuit court. Upon appeal to the supreme court it was held that a court of equity has no jurisdiction to avoid a will, or to set aside the probate thereof, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate courts.

Mr. Justice Bradley, in delivering the opinion of the court, after stating the provisions of the law of California for the probate of wills, and for the contesting of the same within one year by any person interested, said:

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"In view of these provisions it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. The question recurs, do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust as against the purchasers of the estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will, or the probate thereof, could have been raised, if it was not raised in the probate court, during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief."

The laws of Louisiana with regard to the probate of wills, and the review of decrees admitting wills to probate, are quite as favorable to the attainment of justice as those of California.

In the case under consideration there was no obstacle to prevent the complainants from appearing in the probate court and contesting the probate of the will of Mrs. Dorsey, or if the will had been probated without their knowledge or information, which is not averred, from appealing to the supreme court of the state. The law allowed them one year in which to contest the probate of the will. Instead of resorting to the courts which had exclusive jurisdiction of the subject, they come into this court, and, within less than a year from the probate of the will, file the bill in this case.

The proceeding in the probate court was in the nature of

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a proceeding *in rem*, and was binding upon all the world unless appealed from and reversed in a direct proceeding. See case of *Broderick's Will*, *ubi supra*. But the complainants, entirely ignoring the decree in the probate court, which bound them as well as all others interested, apply to this court to set aside that decree, made by a court which was not only competent, but had the exclusive jurisdiction to make it. If this court could, upon the case made by the present bill, revoke the probate of the will, it might, on the application of Davis, who was a citizen of Mississippi, and upon service upon the heirs, who were citizens of other states, have entertained jurisdiction of an original proceeding to probate the will.

But this court has no probate jurisdiction. *Gaines v. Chew and Relf*, 2 How., 619; *Fouvergne v. New Orleans*, 18 How., 470; *Gaines v. New Orleans*, 6 Wall., 642; *Case of Broderick's Will*, 21 Wall., 503.

It is claimed, however, that the case of *Gaines v. Fuentes*, 92 U. S., 10, is authority for this bill.

There are general expressions in the opinion in that case which would seem to sustain this claim, but those expressions must be interpreted by the light of the case then before the court. It is to be observed that the case of *Broderick's Will* is not overruled, but approved by the case of *Gaines v. Fuentes*. There must, therefore, be material differences of fact between the two cases by which the decisions can be reconciled. These differences are apparent.

In the case of *Gaines v. Fuentes*, the court, in describing the character of the suit, says: "The action is in form to annul the alleged will of 1813, of Daniel Clark, and to recall the decree by which it was probated; but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, the action cannot be properly treated as for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate, to annul the will as a muniment of title, and to restrain the enforcement of the

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decree, by which its validity was established, so far as it affects their property."

The petition in that case to revoke the probate of the will was originally filed in the second district court of the parish of Orleans, invested with probate jurisdiction. The statement of facts in that case; on which the opinion of the court is founded, shows that the plaintiff in error (Mrs. Gaines) applied on January 18, 1855, to the second district (probate) court of the parish of Orleans, for the probate of the alleged will of Daniel Clark; that by the decree of the state supreme court the will was recognized as the last will and testament of Daniel Clark; that this decree was obtained *ex parte*, and by its terms authorized any person at any time, who might desire to do so, to contest the will and the probate in a direct action, or as a means of defense, by way of answer or exception, whenever the will should be set up as a muniment of title; that the plaintiff in error subsequently commenced several suits against the petitioners (Fuentes and others) in the circuit court of the United States, to recover sundry tracts of land, situate in the parish of Orleans, in which they were interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator.

From this it appears (1) that the suit to revoke the probate of the will of Daniel Clark was originally begun in the state court, by which the decree of probate complained of was in the first instance rendered; (2) that that decree expressly reserved the right to persons interested to contest the will and its probate either by direct action or by way of exception, whenever the will should be set up as a muniment of title; (3) that suits had been commenced by Mrs. Gaines, claiming title under said will, to recover property in which the petitioners were interested; and (4) that the suit to annul the will and revoke its probate was brought by persons who were not heirs or devisees or next of kin, and did not ask to be substituted in place of the devisee, but was brought by strangers to the estate and blood of the testator, to annul the will as a

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muniment of title so far as it affected their property, but no further.

In these material respects the case of *Gaines v. Fuentes* differs from the case of *Broderick's Will* and the case under consideration. This case of *Gaines v. Fuentes* is therefore not a precedent to control this case, but Broderick's case is.

These complainants were bound by the decree rendered by the probate court of the parish of Orleans. No fraud is alleged on the part of the defendant in procuring that decree, and complainants had notice of its rendition, and could have taken steps in the probate court to reverse it. They cannot ignore that decree and come into this court to annul it.

I am therefore of opinion that this court has no jurisdiction of so much of the case presented by the bill as seeks to annul the will of Mrs. Dorsey and set aside the probate thereof.

This is decisive of the whole case, for the right of the complainants to an account from the defendant depends upon the success of their effort to set aside the will of Mrs. Dorsey and the probate thereof. As long as the decree of the second district court admitting the will to probate, and recognizing the defendant as the sole and universal legatee of Mrs. Dorsey, remains in force, the complainants have no standing which authorizes them to demand an account of the defendant.

So if the deed of February 19, 1879, conveying Beauvoir to the defendant, should, for the reasons stated in the bill, be declared void, still the title of defendant to the same would be good and indefeasible under the will of Mrs. Dorsey as long as the will remains of force and the probate thereof unrevoked.

In a word, if this court has not jurisdiction to set aside the will of Mrs. Dorsey and revoke its probate, it cannot grant any of the relief prayed for by the bill.

Demurrer sustained.

The Prince Edward.

THE PRINCE EDWARD.

On a clear moonlight night, a steamer and sailing vessel, running in opposite directions on a river between half a mile and a mile wide, collided with each other; the two boats having been in plain sight of each other immediately before the collision, while running a distance of about four miles. *Held*, that these facts put the burden of proof on the steamer to show that she was not in fault.

ADMIRALTY APPEAL.

Messrs. G. H. Braughn, Geo. H. Buck, C. F. Dinkelspeil and J. Ward Gurley, Jr., for libelant.

Messrs. C. B. Singleton and R. H. Browne, for claimant.

WOODS, Circuit Judge. The suit is brought to recover damages sustained by the schooner Sargent S. Day, by reason of a collision between her and the iron steamer Prince Edward.

The collision took place on the Mississippi river, about fifty-eight miles below the city of New Orleans, on February 1, 1876, at about the hour of 9 o'clock P. M.

The schooner, which was of eighty tons burden, was descending the river and the steamer was ascending. The night was clear and the moon was shining brightly. The two boats were in plain sight of each other before the collision, while running a distance of three and a half or four miles.

The river was between a half a mile and a mile wide at the place of collision, and there was a straight stretch of several miles.

It was the duty of the steamer to keep out of the way of the sailing vessel. The fact that there was a collision under these circumstances puts the burden of proof on the steamer to show that she was not in fault.

There is some conflict of evidence, but the clear preponderance of testimony appears to me to sustain the claim of the schooner that she kept her course, and that she did not change it until the last moment, when the collision was imminent, and a change was absolutely necessary to keep her from being run down by the steamer.

The Yeager.

Entertaining this view, I must hold that a decree should be rendered for libelant for the damage sustained by the schooner. This is pretty well settled by the evidence and the report of the master to be \$845.40. There will be a decree for that amount in favor of libelant, with interest from judicial demand, and costs.

APRIL TERM, 1880.

THE YEAGER

It is no defense to a libel brought against the vessel in fault to recover damages caused by a collision, that the owners of the injured vessel have been satisfied by the insurers for the damages sustained by her.

ADMIRALTY APPEAL.

The libel was filed to recover for damages sustained by the steamboat Charles Morgan, of which libelant was the owner, by a collision between her and the defendant steamer H. C. Yeager, which occurred on December 11, 1876, about eighty-five miles below Cairo on the Mississippi river, by the fault, as it was claimed, of the H. C. Yeager. There seemed to be no question that the Yeager was in fault. The controversy in the district court was over the amount of the damage sustained by the Charles Morgan. After the appeal to the circuit court, evidence was taken tending to show that the libelant had received from the insurance companies in which the Charles Morgan was insured, satisfaction for the damage sustained by the collision.

Messrs. J. H. Kennard, W. W. Howe and S. S. Prentiss, for libelant.

Messrs. C. B. Singleton and R. H. Browne, for claimant.

WOODS, Circuit Judge. It is established by the decided weight of testimony that the damage sustained by the

The Suliote.

Charles Morgan was at least as great as the sum allowed by the district court.

The question of damage was twice referred to a commissioner in the district court, and his report, on which the decree of the district court was founded, appears to have been amply sustained by the evidence. The new evidence introduced in this court on the question of damages does not meet the evidence on which the commissioner based his report.

I am of opinion that the damages sustained by the collision were correctly found by the district court.

The defense that the insurance companies have paid Stein, the libellant, for the damages sustained by his steamboat will not hold.

It was decided by the supreme court of the United States, in a case where a schooner was lost by a collision with a propeller, the latter being in fault, that the fact that the libellants had received satisfaction from the insurers for the schooner destroyed, furnished no ground of defense. *The Monticello v. Mollison*, 17 How., 152. See, also, *Althof v. Wolf*, 2 Hilt., 344, and cases there cited.

There must be a decree for libellant for the damages sustained by the collision, which are found to be \$2,087.27. To this must be added interest from the date of the decree in the district court, to wit, March 20, 1879, and costs.

THE SULIOTE.

1. The services of boats equipped with steam pumps and other apparatus for the extinguishment of fires upon vessels, in putting out a fire upon a ship moored at the levee in New Orleans, are salvage services.
2. The amount of salvage to be allowed depends on the extent and danger of the salvage service, the risk to which the vessels and other property employed in the service are exposed, the value of the property saved, and the imminence of the peril by which it is threatened.

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3. Salvage should be regarded in the light of compensation and reward and not of prize, and should not exceed what is necessary to insure the most prompt, energetic and daring effort at rescue.
4. A fire upon a vessel loaded with cotton and moored at a wharf, the vessel, cargo, etc., being valued at \$250,000, having been extinguished with little exertion and little risk to the salvors and their craft, eight per cent. on the value of the vessel, cargo, etc., was allowed as salvage.
5. In the distribution of salvage earned by steam vessels equipped for the extinguishment of fires, and their officers and crew, the men were allowed a certain number of months' wages, graduated in some degree by the services rendered by the vessels respectively.
6. The amount paid for procuring, compressing and loading a cargo of cotton should contribute to the salvage earned in extinguishing a fire upon a vessel before her voyage had actually commenced.
7. In the distribution of salvage in this case, regard was had to the fact that the value of the aid rendered by one of the salvor's vessels was enhanced by the fact that she was specially designed and equipped for the extinguishment of fires, and was always ready and powerfully efficient for that purpose.

ADMIRALTY APPEAL.

Messrs. M. M. Cohen, R. De Gray, E. C. Kelly, Joseph P. Horner, W. S. Benedict, B. Egan and James Legendre, for libelants and intervenors.

Mr. James McConnell, for claimants.

BRADLEY, Circuit Justice. The questions in this cause are, first, whether it is a case for salvage; secondly, if it is, how much compensation ought to be allowed to the salvors; thirdly, how it should be apportioned amongst them; and fourthly, who are to contribute thereto.

Very little need be said on the first question. It being discovered shortly before six o'clock on the morning of the 28th of March, 1879, that the ship Suliote was on fire, the signal of distress was immediately given by ringing the alarm bell, and messengers were sent out for assistance.

In response to the call the tugboat Belle Darlington, lying a short distance above, backed down alongside of the Suliote and threw her hose upon the deck of the latter, and commenced to play into the hatchway, where the smoke

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was seen to issue, and was shortly afterwards joined by the Maud Wilmot and the Protector, and by their joint efforts the fire was extinguished.

When a vessel is in distress and in danger of destruction, and calls on others for help, or, being abandoned, is saved by their voluntary efforts, it is a case of salvage, unless the salvors act in the performance of a mere duty, as where they are employed by the public authorities to perform the very service. Had the fire department of New Orleans extinguished the fire whilst the vessel was lying at the wharf, no salvage could have been claimed. But, although the services of the department were offered, they were not accepted by those in charge of the ship. The vessel and cargo were saved by the voluntary efforts of those who came to her relief.

We think the case is clearly one of salvage.

2. The amount of salvage that ought to be allowed for the services performed depends on several considerations, as, first, the extent and danger of the services; secondly, the risk to which the vessels and other property employed in the service were exposed; thirdly, the value of the property saved and the risk of destruction by which it was imperiled.

The extent and danger of the service were inconsiderable. The Belle Darlington and Maud Wilmot were actually employed in throwing water only a few minutes, less than half an hour, though they stayed in the vicinity until the fire was extinguished.

The Belle Darlington was first on the spot, and first played on the fire in the hold, and remained, with the acquiescence of the master of the Suliote, to give further assistance if necessary. She had five hands on board, including her master. The Maud Wilmot, after pumping a few minutes, was requested to leave, as her services were not required. The Protector, with eleven hands, including the master, was employed the whole of Friday, and part of Saturday, until the fire was extinguished. She belonged to the New Harbor Protection Company, and was constructed and

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furnished with powerful apparatus for extinguishing fires, and kept in readiness for that purpose.

She employed not only water, but carbonic acid gas, which being forced into the hold with the hatches closed, extinguished the fire without injuring the cargo — perhaps not so effectually as water in penetrating the interior of the bales of cotton. This was shown by the revival of the fire two or three times when exposed to the air by the removal of the hatches. The master of the Suliote had special confidence in the efficiency of the Protector, which was the vessel for which he sent out messengers when the fire was discovered; and after she had commenced operations his reliance was placed on her alone. None of the vessels employed were exposed to any danger whatever.

The Suliote was at the wharf, in still water, and all the operations were carried on without any risk to the vessels or the men, except what was incurred by Higgins, who, after the removal of the hatches, descended into the hold, encased in armor, for the purpose of fastening the tackles to the bales required to be taken out of the ship.

The fire had not made much progress, only thirty or forty bales had caught, and only about five hundred were taken out of the ship, although the whole cargo exposed to danger consisted of four thousand one hundred bales. The fire had not proceeded so far as to render its extinguishment a matter of much difficulty with the appliances at command, although this fact was not known until it was subdued.

The property in hazard was large in amount. The vessel was valued at \$10,000, the cargo at \$230,000, and the sum which had already been expended in procuring and loading the freight amounted to nearly \$10,000; all which would have been sacrificed if the fire had not been stayed.

The salvage allowed by the district court was fifteen per cent. of the value of ship, cargo and net freight, amounting to nearly \$37,000; and according to the rate of distribution adopted, giving to some of the men over \$2,300 apiece, and ranging from that down to \$1,500, \$800, \$400 and \$200.

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The allowance to the Belle Darlington and the Protector was equal, and by giving the men of the former one-half of her allowance, and to those of the latter one-fourth of hers, the men of the Belle Darlington received individually nearly three times that received by those of the Protector, although the latter were engaged the longest in the work.

From a review of the case we are not disposed to allow as much salvage as was awarded by the district court. The allowance of anything like a uniform percentage on the value of the property saved in such cases, would be attended with great inequality and injustice. Whilst regard must be had to the value of the property, it is not the only controlling circumstance; and the other grounds of allowance in this case, as we have before seen, were quite inconsiderable.

Looking at the amount of property saved, and the little exertion and risk required to save it, we think that eight per cent. will be ample compensation for the service rendered. Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy; whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to ensure the most prompt, energetic and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage. Anything short of it would not secure its objects.

The courts should be liberal, but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril.

As to the distribution to be made of the award in this cause, we think that it should be so regulated as to put the men belonging to the different vessels upon a footing somewhat in proportion to the service which they respectively performed, and we do not perceive any better method of

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doing this than by allowing the men belonging to each vessel a certain number of months' wages, graduated in some degree by the vessel's service. We think that an allowance to the master and men of the *Maud Wilmot* of two months' wages, to those of the *Belle Darlington* of three months, and to those of the *Protector* of four months, to be deducted respectively from the several amounts awarded to said vessels and their crews, will be amply sufficient.

We concur with the district court in awarding to Higgins the sum of \$500, and to Johnson \$250. As to the award to be made to the respective vessels and their crews, we are of opinion that the sum of \$2,000 should be awarded to the *Maud Wilmot* and her crew, and that the balance of the total salvage allowed, after deducting the amount awarded to Higgins and Johnson, and to the *Maud Wilmot* and her crew, and the costs of this appeal, should be distributed, one-third to the *Belle Darlington* and her crew, and two-thirds to the *Protector* and her crew.

The property saved and liable to salvage consists of the ship, valued at \$10,000, the cargo, valued at \$230,000, and an equitable proportion of the freight. The gross freight was valued at £3,551 12s. 5d., amounting at the rate of \$4.84 to the pound sterling, to the sum of \$17,189.84. But this had not been earned, and, indeed, if we consider the voyage as not having commenced, no part of it had even been equitably earned, and we were at first in doubt whether the freight ought to be taken into the account. But the proof shows that the owners of the ship had, at the time of the fire, expended \$9,316.50 in procuring, compressing and loading the cargo. This was an investment in respect of the freight, and was saved to the owners by the saving of the ship and cargo, whereby they were enabled to perform their contract.

The amount of expenses thus incurred ought, in equity, we think, to contribute its proportion to the salvage to be paid. See *The Norma*, Lush., 124; Jones on Salvage, 191. This would make the total amount of property saved \$249,316.50.

The Wanderer.

From this amount will be deducted the costs in the district court, amounting to \$1,510.15, which are chargeable to the claimants, and the eight per cent. of salvage will be calculated on the balance of \$247,806.35, amounting to \$19,824.51. The costs of the appeal will be deducted from this sum as being chargeable to the libelants, and the balance will then be distributed as before stated. In this distribution no special allowance will be made to the Protector for the cost of gas or materials, that being taken into consideration in awarding to her two-thirds of the balance. In making this award to the Protector, we have had regard to the fact that the value of her aid in affording salvage service is greatly enhanced by her being fitted and furnished for performing this kind of work.

Being always ready and at hand, and powerfully efficient for the accomplishment of her purpose, a fire happening to any vessel in the harbor is bereft of much of its terror, and the damage actually ensuing therefrom is in most cases, and probably was in this case, greatly lessened in extent.

THE WANDERER.

A contract by a vessel engaged in making regular trips between two ports, for the employment of a purser for a year, gives the party employed a lien for his wages for the entire year, and if discharged without cause before the end of his term of service, he may enforce his lien against the vessel.

(Before BRADLEY and WOODS, JJ.)

ADMIRALTY APPEAL.

The libel alleged that on October 10, 1879, the Wanderer being about to proceed upon a voyage to Belize, British Honduras, and the islands in the Gulf of Mexico, and thereafter regularly to trade and carry freights between said ports and the city of New Orleans, the libelant was employed by the agent of said vessel to serve as her purser for the period of one year, at a yearly salary of \$900; that libelant at

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once entered upon his duties as such purser, and performed them faithfully, and to the satisfaction of the master of the Wanderer, until December 26, 1879, when, without any just cause, he was discharged by said master, though libelant was ready and willing to perform the duties of his employment for the residue of the year for which he was engaged; that his wages were paid up to the date of his discharge, but he had received no wages for the residue of the year since his discharge. The libelant claimed \$712.50 as wages due him for the period between December 26, 1879, the date of his discharge, and October 10, 1880, the termination of his engagement.

To this libel the claimant filed a peremptory exception, on the ground that the claim therein set up did not constitute an admiralty lien against the vessel, and an action *in rem* did not lie therefor.

Mr. Joseph P. Horner and Francis W. Baker, for libelant, cited *Coffin v. Jenkins*, 3 Story, 108; *Truesdale v. Young*, 1 Abb. Adm., 391; *The Steamboat Hudson*, Olcott, 394; *The Balize*, 1 Brown, 424.

J. W. Gurley, Jr., for claimant, cited *The Island City*, 1 Low., 375; *Paul v. The Ilex*, 2 Woods, 229; *Phillips v. The Scattergood*, Gilp., 1; *Thatcher v. McCulloh*, Olcott, 365.

Woods, Circuit Judge. The case made by the libel is an action by a seaman to recover his wages. The libelant had made a contract of service for one year. He performed part of the contract, and was ready and willing to perform the residue, but was prevented by the master of the vessel, who discharged him without cause. He sues to recover the balance due on his salary for the year. If he performed his duty while in the service of the vessel, and was ready and willing to perform it for the residue of his engagement, and was discharged without due cause, and was unjustifiably prevented from completing his contract, his rights are the same as if he had completed it. He is entitled to his wages for the whole year, and was entitled to sue for them on his

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discharge. He has been paid a part of his wages, and sues for the balance.

In the case of a contract for an ordinary seaman's wages, the lien should not perhaps be extended beyond a single voyage, as that is the usual time for which his engagement is made.

But the case of a purser stands somewhat on a different footing. His connection with the vessel is generally more permanent than that of a common seaman. He represents to some extent the owners, and his qualifications are of such a character that a competent purser cannot usually be employed for a single trip. We, therefore, do not think an engagement of a purser for a year an unreasonable one, and such an engagement, we think, would be binding on the boat.

The case of libelant therefore falls within the thirteenth admiralty rule, which declares that "in all suits for mariners' wages, the libelant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone *in personam*."

The cases cited by claimant are to the effect that a seaman discharged in a foreign port may sue for his three months' extra wages *in personam*; that a personal action for wages lies, immediately on the discharge of a seaman, against the master and owner, without waiting ten days after the right of action has accrued, as required in an action *in rem*; that a stevedore has no maritime lien for his wages, and that an action *in rem* does not lie for refusal on the part of the master to perform a contract of charter-party.

These cases do not meet the question. They may all be good law; yet they do not show or tend to show that the libelant has not a maritime lien for the demand set out in his libel. On the other hand, the case of *The Hudson*, Olcott, 390, cited by libelant, is an authority directly in support of his right to proceed *in rem*.

We are of opinion, therefore, that the exception is not well taken, and must be overruled.

BRADLEY, Circuit Justice, concurred.

The Cara.

THE CARA.

The owner of a steamboat who has chartered her to another is a "third person" within the meaning of art. 3274 of the civil code of Louisiana; and one who furnishes supplies to the boat in her home port, during the life of the charter-party, cannot assert a lien against her after she has been returned to her owner, unless he has recorded his lien according to law.

(Before BRADLEY and WOODS, JJ.)

ADMIRALTY APPEAL.

The libelants, W. G. Wilmot & Co., and the intervenors, Lagan & Mackinson, assert a lien upon the defendant, the steamboat Cara, for supplies furnished in the home port. The lien is claimed under the local law of Louisiana, Revised Civil Code, article 3237. The defense, set up by way of exception, is that the contract for supplies was not recorded as required by law, and therefore no lien attached.

The libelants claimed for coal furnished the Cara to the amount of \$345, between January 13 and 23, 1879. Their lien therefor was not recorded until March 7, 1879. The intervenors, Lagan & Mackinson, claim \$74.07 for other supplies furnished between January 9 and 13, 1879, and their lien was not recorded until March 10, 1879.

The Revised Civil Code, art. 3274, declares: "No privilege should have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract is entered into."

The libelants and intervenors contended, in reply to this, that the claimant was not a third person within the meaning of art. 3274 of the Revised Code.

The supplies were furnished to the Cara, by the libelants and intervenors, while the Cara was in possession of Dodge & Doherty, to whom she had been chartered by her owner, the claimant, on January 7, 1879, for three months from that

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date. At the time the steamboat was seized she had been returned to and was in possession of the claimant.

Mr. B. Egan, for libelant.

Mr. Joseph P. Horner, for claimant.

WOODS, Circuit Judge. The act or other evidence of debt on which the libelant bases his claim was not recorded on the day the contract was made, as required by art. 3274 of the code, nor within seven days thereafter, as provided by an amendment passed in 1877. See Acts of 1877, page 59. The only question is, therefore, whether the owner of the boat falls within the term "third persons," found in article 3274.

We think the case of *Beard v. Chappell*, 23 La. An., 694, furnishes an answer to this question. In that case it was held that "the debtor for supplies being a lessee, the owner of the plantation and the stock thereon is a third person within the meaning of article 123 of the constitution. If, therefore, the owner of the plantation, a third person, was in possession of the cotton at the time the privilege was asserted by the furnisher of supplies, then and in such case the furnisher could not hold the same, because, not having had his privilege recorded, and the cotton having passed into third hands, the privilege was lost."

This authority covers this case. As against the owner of the boat, who was a third person in possession, the libelants and intervenors had no lien, because their contract had not been recorded as required by law. A lien is necessary to the relief they ask. *The Lottawanna*, 21 Wall., 558. The libel and intervention must be dismissed, with costs.

BRADLEY, Circuit Justice concurred.

NOVEMBER TERM, 1880.

REUBEN CHAPMAN v. THE SUCCESSION OF HUGH WILSON.

1. Although courts of equity are not strictly bound by the local laws of prescription, yet they generally follow the analogy of those laws and refuse to enforce claims that have become stale by the lapse of the prescribed period.
2. But in cases of peculiarly equitable cognizance regard is always paid to the force of special circumstances.
3. By the local law of Louisiana actions for nullity or rescission of contracts are prescribed by the lapse of five years. *Held*, that a bill in equity to set aside a settlement on the ground of fraudulent concealment, which was not filed until twelve years after the settlement, and nine years after the discovery of the alleged fraud, should, under the circumstances of this case, be dismissed on account of unreasonable laches and the staleness of the claim.
4. In case of the delivery and acceptance of a specific thing in satisfaction of a debt, there is an implied understanding that the debtor guarantees his authority to dispose of the thing in that way; and a failure of his title will put the parties in their original relations to each other. But where there is a contrary understanding, the creditor is bound by the settlement, notwithstanding the failure of title.
5. On the question of failure of consideration the eviction or decree of nullity must be final before it can constitute a ground of rescission.

This was a case in equity which was heard upon the pleadings and evidence. The facts sufficiently appear in the opinion of the court.

Messrs. Francis W. Baker and Geo. W. Lane, for complainant.

Messrs. John Finney and W. S. Finney, for defendants.

BRADLEY, Circuit Justice. Reuben Chapman, the complainant in this case, formerly governor of Alabama, and a lawyer by profession, for a long time prior to the late civil war, and to some extent during the war, had dealings as a planter in Alabama with the firm of Bradley, Wilson & Co., commission merchants and bankers of New Orleans, who

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had a branch house at Huntsville, Alabama. Before the war commenced the firm had become largely indebted to Chapman, and the debt was somewhat increased afterwards. Their dealings being very extensive, and many of their assets proving worthless, they became financially very much embarrassed. In May, 1867, whilst in this condition, their account with Chapman showed a balance due to him of \$23,650.29, which they proposed to compromise and settle by transferring to him a claim which they held against one Richard Prewitt, consisting of two notes drawn in 1861, and then past due, amounting, with interest, to \$20,136.23; and an open account amounting to \$1,231.71; and a draft against one Nimmo for \$150.75. The claim against Prewitt was secured by a provision in a marriage settlement made on the 27th day of April, 1866, between Prewitt and his wife before marriage, by which certain lands therein conveyed were appropriated, first, to the satisfaction of Prewitt's indebtedness to Bradley, Wilson & Co., and after that to certain other designated purposes. A transfer to Chapman of this security was embraced in Bradley, Wilson & Co.'s proposition for a settlement with him, as Prewitt was known to be insolvent, and the only value of his notes and indebtedness consisted in this supposed security.

Chapman consulted on the subject of said proposition, L. P. Walker, Esquire, of Huntsville, Alabama, a lawyer of standing and character, who had previously, at various times, been the attorney of both parties, and who, on this occasion (as he testifies), acted as the mutual friend of both, but not as attorney for either. He gave it as his opinion that the security was a valid one, he having drawn up the marriage settlement, and being acquainted with the entire transaction, and being himself secured thereby in reference to a debt due from Prewitt to him. Chapman thereupon consented to the proposed arrangement, and the transfer was made accordingly, the notes being indorsed to Walker as agent of Chapman, at the latter's request, but indorsed "without recourse except as to the consideration;" and the interest of Bradley,

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Wilson & Co., in the security created by the marriage settlement, and in the open account against Prewitt, being assigned to Walker in like capacity as agent for Chapman; and the latter, in consideration of said transfers and assignment, executed a paper releasing and discharging Bradley, Wilson & Co. from all liability in reference to their indebtedness to him.

The present suit is brought to set aside this settlement, and to make the estate of Wilson, one of the firm of Bradley, Wilson & Co., now deceased, liable for the whole amount due, as though no settlement had been made.

Chapman never received any money from the securities transferred to him. The Nimmo note was worthless at the time, Nimmo being insolvent, and dying soon afterward. The marriage settlement, which was the principal thing relied on, was attacked by other creditors of Prewitt, and sought to be set aside as being fraudulent and void as against them. A suit for this purpose was brought by one Lile in December, 1866, in the chancery court of Lawrence county, Alabama, against Prewitt and his wife, Bradley, Wilson & Co., and Walker and others. This suit was pending when the settlement with Chapman was made, and the defendants had filed their answers therein. A decree was rendered in 1874 sustaining the marriage settlement and dismissing the bill. In December, 1870, another suit was commenced for the same purpose by one Robert H. Wilson, Prewitt's assignee in bankruptcy, in the circuit court of the United States for the northern district of Alabama; and that court, in April, 1878, made a decree declaring the marriage settlement fraudulent and void. Both of these decrees were appealed; the former to the supreme court of Alabama, and the latter to the supreme court of the United States, and these appeals are still pending; so that the ultimate fate of the security which was assigned to Chapman in May, 1867, is yet undetermined.

The bill in this case was not filed until the 15th day of October, 1879, more than twelve years after the transaction took place which it assails. It seeks to set aside the settle-

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ment on the grounds of fraud, mistake and want of consideration. It alleges that Bradley, Wilson & Co., at the time of the settlement, and as an inducement thereto, represented themselves to be insolvent, when in truth they were not insolvent; that they represented the security contained in the marriage settlement to be good and valid, when in fact it was fraudulent and void; and that they concealed the fact that a suit had already been instituted against Prewitt and themselves to set the marriage settlement aside. It alleges that the complainant, Chapman, was ignorant of the facts, and was deceived by these representations and concealments, and was thus induced to make the settlement, which he would not have done had he known the truth. The bill is filed against the succession of Wilson, as before stated, and prays that the settlement of May, 1867, may be set aside, and that the complainant may be admitted as a creditor of the succession, and may have a decree for the payment of his entire claim against Bradley, Wilson & Co., with the accumulated interest.

The defendants, who are the widow and executors of Wilson, have filed an answer, denying all the charges of the bill, and setting up the defense of prescription of ten years. Formerly, by the Civil Code of Louisiana (art. 3507), the action for nullity or rescission of contracts, testaments, etc., was prescribed by five years where the party entitled to sue was in the state, and by ten years if he was out of it; but by the Revised Code of 1870 (art. 3542), the time is reduced to five years in all cases, without regard to the plaintiff's residence, subject, of course, to the rule that the time commences to run only from the date of discovering the error or deception complained of as the cause of nullity or rescission.

Although courts of equity are not strictly bound by the local law of prescription, or statute of limitations, yet they generally follow the analogy of those laws, and refuse to enforce claims that have become stale by the lapse of the prescribed period. In cases, however, of cognizance peculiarly equitable, regard is always had to the force of special

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circumstances. "There are cases," says Mr. Justice Story, "in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief. But all these cases stand on special circumstances which courts of equity can take notice of, when courts of law may be bound by the positive bar of the statute." Eq. Jur., § 64a. Again, "it is a most material ground in all bills for an account, to ascertain whether they are brought to open and correct errors in the account *recenti facto*, or whether the application is made after a great lapse of time." . . . "In matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from a consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus, non dormientibus, jura subveniunt*." Id., § 529.

These remarks are as applicable to bills for setting aside a settlement on the ground of fraud and concealment as they are to bills for opening a stated account. They are strongly applicable to the present case. The complainant, in his bill, in order to obviate the objection of lapse of time, places himself on the ground that he did not discover the fraud practiced on him until December, 1870, when the assignee in bankruptcy of Prewitt filed his bill to set aside the marriage settlement, and made the complainant a party to it. And yet, after this, he waits nine years longer before filing his bill; and, now, at the end of twelve years and a half after the transaction took place, after the death of parties and witnesses, and all the changes that are consequent upon the lapse of time, he comes into court and asks its equitable relief. The allegation that he did not discover the fraud until 1870 (even if it could avail), as might be expected

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after this long delay, is only sustained by the complainant's own testimony. Mr. Walker testifies that he does not know when Chapman first learned of the pendency of the first suit (brought by Lile); but his recollection is, that he knew of it before the commencement of the second suit (by the assignee). Mr. Bibb, one of the firm of Bradley, Wilson & Co., being examined as a witness in reference to the settlement with Chapman, denies that any suit was pending on the subject of the marriage settlement, or that he made any representations in regard to it. What else but the utmost vagueness of recollection could be expected, even in those who participated in the transaction, after the lapse of so many years? The complainant himself is responsible for this state of things. He admits that he waited nine years after discovering the alleged fraud before taking any steps to substantiate it, or to procure the redress to which it entitled him. His excuse is, that the question of the validity of the marriage settlement was pending and undecided in the courts during that period, and he could not be expected to proceed in the assertion of his rights until that question was settled. This plea cannot avail the complainant. The fraud which he alleged was practiced upon him did not depend on the decision which the courts might make as to the validity of the marriage settlement. He says he discovered the fraud in 1870. He should have repudiated the settlement at once, and taken proceedings to have it set aside whilst the facts were still fresh in the minds of all parties. He evidently preferred to speculate on the result; if the marriage settlement was sustained, he would stand by the settlement made with Bradley, Wilson & Co.; if not sustained, he would fall back on the charge of fraud and concealment. By electing to await the result and postponing for so many years any proceedings for establishing the fraud and setting aside the settlement, the complainant has allowed his claim to become stale, and has waived his right to assert it.

But I am not satisfied, from the evidence, that any misrepresentation or concealment was practiced upon the com-

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plainant. As to the alleged representation of insolvency, the weight of evidence in the case is, that the pecuniary affairs of Bradley, Wilson & Co. were in such a state of embarrassment and uncertainty in May, 1867, that they might well have supposed, as Mr. Bibb, one of the partners, testifies they did suppose, that they were really insolvent, and could only hope to settle with their creditors by compromise and the transfer of such assets as they had. If by such compromises, and a favorable turn in the value of their property, they afterwards succeeded in saving a considerable surplus, this circumstance would not only not be sufficient to set aside the compromises made by them when they really supposed they were insolvent, but it would not be a just ground for any reflection on their conduct as men of business.

If this view is correct, the case, upon its merits, is reduced to a consideration of the questions relating to the Prewitt security contained in the marriage settlement. The question of the alleged concealment in not disclosing the fact that a suit was pending at the time of the settlement, calling in question the *bona fides* of the Prewitt marriage settlement, has already been adverted to. We have only the evidence of Governor Chapman himself to establish such concealment; and that evidence only amounts to this, that he was not aware of the existence of the suit, and that it was not mentioned in the transaction. This does not show that there was any concealment. The matter may not have occurred to the parties. Mr. Walker seems to have been perfectly confident of the validity of the marriage settlement, and of the futility of any efforts to assail it; and he may not have regarded Lile's suit as of any importance. If mentioned, he may have so expressed himself to Governor Chapman when consulted about the marriage settlement; if not mentioned, it may not have occurred to him. A reference to it may have been made, and may easily have escaped the complainant's recollection. If satisfied with Walker's views at the time, the details of their conversations may have passed out

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of his memory. The lapse of time comes in here as an important factor on the question of recollection and the weight of evidence.

Then, as to the alleged representations about the validity of the marriage settlement; there is not a particle of evidence to show that any representations were made which the parties did not at the time honestly believe to be true, or that any facts were represented different from what they were. The validity of the marriage settlement, as against creditors of Prewitt not provided for in it, was a question of law resting in opinion; and not a question of fact resting in evidence and representation. When it was alleged to be valid, it was so alleged as a matter of belief. No misrepresentation of *facts* is set out in the bill, and none is established by the proofs.

As Mr. Walker acted as the mutual friend of both parties in the settlement, his testimony is important, and an abstract of it will, perhaps, give a clearer view of the transaction, as it actually occurred, than any statement which can be made; somewhat fragmentary, it is true, being drawn out by interrogatories, but nevertheless clear and to the purpose.

Speaking of the settlement of May 12, 1867, Mr. Walker says that he did not consider that he represented either of the parties in a professional capacity; that the assignment of the securities was made to him as agent at Governor Chapman's request, but for what reason he does not know; that he thought it a good settlement for both of them, and probably so expressed himself to both; that his belief is that Governor Chapman took the transfer because he considered Bradley, Wilson & Co. to be financially embarrassed, and in doubtful condition; that he drew the marriage settlement himself, and believed it valid, and still thinks so, and when the settlement was made he expressed that opinion to Governor Chapman; that he has cognizance of no fact impugning the settlement between the parties.

On cross-examination, he testifies that he had been the

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counsel for Bradley, Wilson & Co. for many years; that he had also often been counsel for Governor Chapman, and is still his counsel in some pending cases; that, as he understood, the adjustment of the debt due from Bradley, Wilson & Co. to Governor Chapman, as it was made, was upon the idea that Bradley, Wilson & Co. were financially embarrassed, and not otherwise able to arrange it; that the proposition of the settlement came from them, and the reason assigned by them for the proposition was their inability to pay the debt in money; that Bradley and Bibb, who were then in Huntsville, where the settlement was made, represented the firm to be in embarrassed circumstances, and unable to pay their indebtedness in cash, and that this was the best settlement they could make; and that Governor Chapman believed this to be so, or he would not have made the settlement, as he was desirous of collecting the debt; that Bradley, Wilson & Co. were reputed in Huntsville to be in great financial embarrassment; that Richard Prewitt was largely insolvent at the time the settlement was made, and the only value attached to his notes and account which were transferred to Governor Chapman grew out of the provision made for his indebtedness to Bradley, Wilson & Co. in the marriage settlement of May, 1866; that he does not remember that any representations were made by Bradley, Wilson & Co. to Governor Chapman, at the time of the settlement, in regard to the lien created by the marriage settlement, as to its *bona fides* and validity, but that he, Walker, told both parties that in his opinion said lien was *bona fide* and valid, and that it protected Prewitt's indebtedness to Bradley, Wilson & Co. to the extent of the value of the lands specifically dedicated to that purpose; that he is satisfied Governor Chapman would not have made the settlement but for the belief that said debt was thus protected; that the marriage settlement has been sustained in a chancery court of Alabama, and an appeal from that decision is now pending, and has been pronounced fraudulent and void by a decision of the circuit court of the United States, and an appeal from that

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decision is also pending; that he, Walker, does not know when Governor Chapman first learned of the pendency of the former suit, but his recollection is that he knew of it before the commencement of the latter suit; that in the settlement he acted as the mutual friend of both parties, and not as attorney of either, and that from his belief in the validity of the marriage settlement, he should have advised Governor Chapman to accept the settlement notwithstanding the pendency of the chancery suit, had that been adverted to.

If to this evidence of Mr. Walker we add that of Mr. Bibb, one of the firm of Bradley, Wilson & Co., who testified very fully as to their embarrassment and supposed insolvency; of their efforts to compromise with their creditors, in good faith; of their desire to secure Governor Chapman in particular, and their offer to turn over to him the Prewitt claim; and of their firm belief in the validity of that claim, it would be asking the court to go a great way to make a decree declaring the transaction void on the ground of misrepresentation, upon the evidence of the complainant alone, given so many years after the happening of the events, however upright in motive and free from all intention to distort the facts we may concede that evidence to be.

The remaining ground of relief is the failure of the consideration of the compromise. But to this it may be answered:

First. Bradley, Wilson & Co. did not guaranty the claim against Prewitt, but expressly declined doing so. Chapman took it at his own risk. The notes were indorsed "without recourse," showing that the transfer was made and accepted without any guaranty, at least so far as relates to the responsibility of Prewitt. Besides, the evidence shows that Prewitt was notoriously insolvent, and, therefore, it is not reasonable to suppose that Bradley, Wilson & Co. intended to guaranty the payment of his notes.

But it is contended that the validity of the marriage settlement, by which the payment of the notes was secured, was guarantied in law by the mere transfer thereof. It is now



EASTERN DISTRICT OF LOUISIANA.

APRIL TERM, 1881.

NEW ORLEANS NATIONAL BANKING ASSOCIATION v. P. S.
WILTZ & Co. AND THE NEW ORLEANS MUTUAL INSUR-
ANCE ASSOCIATION.

1. Under the law of Louisiana, stock in an incorporated company is property which can be pledged by contract and delivery of the stock certificate.
2. The pledgee takes stock so pledged subject to all the liens and privileges which the law imposes on it, and no others.
3. A Louisiana corporation organized under a general law of the state cannot, by its private charter and by-laws adopted for its own government, create a privilege on property actually and necessarily within commerce.
4. Under art. 128 of the constitution of Louisiana of 1868, a privilege on stock was required to be recorded in the registers of mortgages, liens and privileges, to have any effect against third persons.

IN EQUITY. Heard upon pleadings and evidence for final decree.

Messrs. J. D. Rouse and Wm. Grant, for complainant.

Mr. Alfred Grima, for defendant.

PARDEE, Circuit Judge. The bill of complaint herein sets forth that the said complainant was, on the 28th of February, 1873, the holder and owner of a certain promissory note drawn to their own order, and indorsed by said defendants P. S. Wiltz & Co. for the sum of \$12,000, and payable days ninety after date; that in order to secure said note the said P. S. Wiltz & Co. pledged to complainant fifty shares of the capital stock of the defendant, the New Orleans Mutual Insurance Association, and delivered the certificate of such stock to complainant, the said shares of stock then standing in the name of said P. S. Wiltz & Co. upon the books of said

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association; that said note was renewed several times, the said stock always remaining in possession of complainant as a security for said debt, until on the 8th of December, 1873, the amount due on said note was evidenced by the note sued on herein for \$12,000, dated December 8, 1873, and payable thirty days after date, drawn by P. S. Wiltz & Co. to their own order, and by them indorsed; that said defendant, the insurance association, had notice of such pledge, and that it has in its hands a large amount of accrued dividends due on said shares of stock; that complainant has demanded from said association and requested the said association to permit the transfer of said stock in order to realize thereon, as the cashier or president of complainant bank was authorized, under said act of pledge, to make such transfer, but that the said insurance association declined to accede to the complainant's demands. And complainant, therefore, prays that an account be taken of the amount due it by said defendant P. S. Wiltz & Co.; that it be decreed to have a lien and right of pledge upon the said shares of stock, and the accrued dividends thereon; that the said stock be ordered to be sold, and the insurance association directed to make the necessary transfer thereof upon its books, and that complainant be paid by preference the amount realized by the said sale, together with the amount of said accrued dividends, to be applied by complainant in extinguishment of the said debt of Wiltz & Co.

The defendant, the New Orleans Insurance Association, answered, denying the validity of the act of pledge herein declared on, upon the grounds that the same was informal, and that it had not been recorded as required by the laws of this state, and that it conferred no privilege on the said stock; that said insurance association had not been notified of the said pledge. They further answered that they had refused to make the transfer of stock and dividends claimed by complainant, upon the ground that the said defendants, P. S. Wiltz & Co., were indebted to them, and that under their charter no transfer of stock can be made nor dividends thereon paid while the holder of said stock is indebted unto

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the said insurance association; that on the 13th day of April, 1874, the said insurance association obtained a judgment against said Wiltz & Co. for the sum of \$20,000 and interest, and that said shares of stock were seized under execution thereon and sold on May 21, 1878, and realized the sum of \$1,150.15; that they had a lien upon said stock to secure the said indebtedness of Wiltz & Co. to them. They further aver that the president and several of the directors of complainant corporation were directors in said insurance association, and had full notice of said provisions of charter, and of the indebtedness of Wiltz & Co. to the insurance association. They admit that the sum of \$925 accrued as dividends upon said stock during the years 1873, 1874, 1875, 1876, 1877 and 1878. A general replication was filed to this answer by complainant, and the defendants, P. S. Wiltz & Co., having failed to answer, the bill has been taken as confessed as to them.

The proofs and admissions in the record show the indebtedness of P. S. Wiltz & Co. to complainant as alleged, and that the above-described shares of stock were pledged to complainant, and the certificate of such shares of stock delivered to complainant, as set forth in bill of complaint herein. It also appears that said Wiltz & Co. were indebted unto said insurance association in the sum of \$20,000, with interest, and that on the 13th of April, 1874, said association obtained judgment against said Wiltz & Co., in the fifth district court for the parish of Orleans, for said sum, but without any recognition of a lien upon said stock; that subsequently said stock was apparently sold, as set up by said association in the answer herein, but that neither the said insurance association, nor the sheriff, nor the purchaser at said sale, had possession of the certificate of said shares of stock, which always remained under the control and in the possession of complainant; and that the transfer of said stock to the purchaser at said sale was made without the authority or consent of said P. S. Wiltz & Co. or of com-

plainant. The charter and amended charter of the insurance company are shown, as set forth in the answer.

The counsel in this case have gone over a good deal of ground, and have filed very able and exhaustive briefs on each side. The view I take of the case does away with the necessity of examining all the authorities cited.

The case arises under Louisiana law, and many of the cases cited are not in point. Stock in an incorporated company in Louisiana is property, not a credit. *Smith v. Crescent City, etc., Company*, 30 La. An., 1378. It is transferable and salable by actual contract thereto, and a delivery of the certificate. *Id.*

It can, therefore, be pledged by contract and the delivery of the certificate. *Blouin v. Hart*, 30 La. An., 714; *Factors' & Traders' Ins. Co. v. Dry Dock*, 31 La. An., 149. When pledged in this manner, the pledgee takes it subject to all the liens and privileges the law puts upon it. No privilege can attach except by or under operation of law. Where the law gives no privilege, none can be given by contract or consent. *Succession of Rousseau*, 23 La. An., 1; *Hoss v. Williams*, 24 La. An., 568. The insurance company was formed under the general incorporation law of the state by public act passed, before a notary. It has no legislative charter. This charter could not create any privilege unknown to the law of the state, unless the power were expressly given in the general law, which it is not. The general law authorizes corporations to "even enact statutes and regulations for their own government, provided such statutes and regulations be not contrary to the laws of the political society of which they are members." La. Civ. Code, art. 433.

But this cannot be construed to authorize a corporation by charter, or by by-law or statute, to create a privilege on property actually and necessarily within commerce.

The case of *Bryon v. Carter*, 22 La. An., 98, is in point. In that case the by-law of the bank was of as much force as

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the charter in this, because the act of 1855, § 8, in relation to free banks, gave authority to the corporation to direct the manner of the transfer of bank stock on its books, and it is noticed that the by-law in that case is almost identical with the provision relating to transfer in this. See, also, *Bullard v. Bank*, 18 Wall., 589; *Bank v. Lanier*, 11 Wall., 369.

In the case of *Driscoll v. West Bradley Manuf'g Co.*, 59 N. Y., 96, where a lien was claimed under a by-law of the corporation, the court lays down this proposition: "Hence, if the defendant is to maintain this by-law, it must point out the authority, either in its articles of association, and show that they are authorized by law, or in some statute."

I take it that the law in this state is the same. The insurance company, to prevail in this case, must show its authority for the restrictive portion in its charter in some statute or law of the state.

In addition to this, under article 123 of the Louisiana constitution of 1868, in force at the time of the transactions under consideration, the privilege claimed by the insurance company should have been recorded, to have had any effect against third persons. And it should have been recorded, too, in the registry of mortgages and liens and privileges. L. C. C., art. 3388. Recording in any other book would not preserve the privilege. See Louque's Dig., 613, and authorities there cited.

The evidence filed only shows a general recordation of the charters of the insurance company in the society books kept for that purpose. See certificates of recorder attached to charters on file.

The Alabama.

THE PRINCE LEOPOLD.

There can be no maritime lien on a vessel founded on an unexecuted contract to furnish towage.

ADMIRALTY APPEAL.

Mr. J. R. Beckwith, for libelant.

Mr. Emmet D. Craig, for claimants.

PARDEE, Circuit Judge. An unexecuted contract of af-freightment gives no maritime lien. *Schooner Freeman v. Buckingham*, 18 How., 188; *Vandewater v. Mills*, 19 How., 90. An unexecuted contract for furnishing supplies carries no lien. *The Carbarga*, 3 Blatchf., 75. An unexecuted contract for wages, where the voyage was never begun and no services rendered, furnishes no lien. *The City of London*, 1 W. Rob., 89, cited in 19 How., 90, *supra*. Admiralty and maritime liens are not given by implication. *Vandewater v. Mills*, 19 How., *supra*. No reason is given why an unexecuted contract to furnish towage to a vessel should stand on any better footing than though the contract related to freight, wages or materials. It is claimed that towage is a part of the voyage (*Foster v. Davenport*, 22 How., 244), but that must be understood as a towage actually furnished. The owners may have contracts with a dozen different tow-boats that each shall tow the ship, but it is only the ones actually towing the vessel that help begin or complete the voyage.

Let there be a decree maintaining the exception filed, and dismissing the libel with costs.

THE ALABAMA.

A sailing vessel which kept her course, but whose red and green lights were not screened, and which set no torch light at her bow, was sighted two miles distant by a steamship. The boats collided with each other. *Held*, that both were in fault, and that the damages should be divided.

The Alabama.

ADMIRALTY APPEAL.

This was a libel filed by the owners of the sloop-smack Charles Henry against the steamship Alabama to recover damages sustained by the sloop from a collision between her and the steamship on January 5, 1878, in Mobile Bay. The defenses relied on by the claimants were that the collision was caused by the fault of the sloop in not keeping a proper watch on deck, in not having her lights properly set and screened, and in not having a torch or flash light at her bow, as required by the sailing regulations. The district court rendered a decree for libelants for \$1,083.86, and the claimants appealed.

Messrs. Geo. H. Braughn, C. F. Buck, M. Dinkelspeil and J. Ward Gurley, Jr., for libelants.

Mr. E. D. Craig, for claimants.

PARDEE, Circuit Judge. After examining the entire record, I find that the sloop-smack Charles Henry, at the time of the collision with the Alabama, and just prior thereto, was in fault in not having her red and green lights properly guarded and screened, in not having a torch or flash light to show on her bow when she approached the steamer, and I am inclined to believe there was no watch on deck. The failure to screen the red and green lights made it impossible to tell on board the Alabama what the course of the Charles Henry was within some ten points. Her course might be northeast or northwest, and aboard the steamer she would appear to be coming head on. There can be doubt that the shining of these lights on the Charles Henry confused the pilot of the Alabama and rendered the collision probable. The evidence, though slightly conflicting, satisfies me that the Charles Henry never changed her course, and whether her men were below or on watch it was the duty of the steamer to keep out of her way; it was in the open bay where there was plenty of room, and the sloop was seen by the quartermaster of the steamer two miles off. If the sloop had no lights at

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all, the steamer should have avoided the collision if her pilots saw the sloop.

The collision was the result of negligence on both crafts; the damages must be divided.

The claimant's proctor pretends that the commissioner's report is all wrong, and that he did not have an opportunity to produce witnesses as to damages. It would seem that \$150 a month for nonuse of a smack not worth over \$1,000 is pretty high; such a smack would soon pay for itself, lying up.

Whereupon the court entered a decree reversing the decrees and orders in the district court, holding that the collision was the fault of both vessels; that the damages be divided; and made a reference to a commissioner to examine and report actual damage suffered.

THE CENTENNIAL.

1. In case of injury to a seaman by the fault or neglect of the officers of the boat, he is entitled to full wages and to keep and medical attendance until restored, and to passage home.
2. If the injured seaman is kept and cured at a hospital without expense to himself, no allowance should be made him for his subsistence or medical attendance.
3. Where an appeal from the district to the circuit court is taken for delay merely in a suit brought by a seaman to recover wages, etc., while disabled by the fault of the officers of the boat, interest will be allowed.

ADMIRALTY APPEAL.

Mr. R. King Cutler, for libellant.

Mr. B. Egan, for claimants.

PARDEE, Circuit Judge. "In case of injury by fault or neglect of officers, the seaman is entitled to full wages until restored, and for keep and medical attendance." *Desty*, *Shipp. & Adm.*, and cases there cited, § 155.

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A careful examination of the evidence filed in the record satisfies me that the libelant came to his injury — a broken leg — while in the performance of his duty, through no fault of his own, but solely from a faulty and dangerous gangway over which libelant and his comrades were ordered to carry coal. The injury was received in the night, at a coaling place, and the evidence is doubtful as to whether proper lights were furnished. It was the duty of the officers of the boat to have provided a safe and proper gangway and suitable lights. Short planks, so placed as to tip and slip, do not make a safe gangway for men to pass over carrying heavy articles of freight or fuel.

Libelant's wages were \$25 per month. The district court allowed six months for restoration, which is short enough for full recovery of a broken leg. As libelant was sent to hospital without expense to himself, no allowance can be made for keep and medical attendance. As libelant shipped at St. Louis and was left here disabled, he is entitled to passage home, amounting to \$12.50, as fixed by the district court. Libelant now asks for an increase of wages on the ground that the recovery has not taken place in the six months allowed, but now, over one year from the injury, there is not complete recovery. I find no evidence in the record on this subject, and therefore cannot consider it.

The demand for interest on account of delay through the appeal is better founded. Five per cent. may be allowed, the legal rate in this state. No appeal should have been taken on the evidence submitted below.

Let a decree be entered for \$162.50, with interest at five per cent. from January 10, 1880, and for costs in favor of libelant, and against respondents and sureties.

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HANCOCK V. HOLBROOK AND OTHERS.

1. Under the statutes of Louisiana, a sale made of all the property of a private corporation by order of its board of directors to pay its only debt, and afterwards ratified by the vote of three-fourths of the stock represented in a general meeting of stockholders called to act on the subject, is, in the absence of fraud, valid.
2. A private corporation bought on credit all its property, for which one of its stockholders became bound. He failed to pay the debt when it became due, and by vote of the directors the property was sold to a third person in satisfaction thereof, and he sold it on credit and conveyed it to said stockholder. *Held*, there being no fraud shown, that the purchaser did not take the property subject to a trust in favor of another stockholder, in proportion to the amount of the latter's stock in the company, when it appeared that the inability of the first mentioned stockholder to pay the debt was caused by the unwarranted defection and withdrawal from the business of the company of the stockholder in whose behalf the trust was set up.

IN EQUITY.

Mr. H. C. Dibble, for complainant.

Messrs. T. J. Semmes and R. Mott, for respondents.

BILLINGS, District Judge. This case is submitted for a final decree upon bill, answer, depositions and exhibits. The suit included Charles T. Howard as one of the defendants, whose claim upon the property hereafter described was admitted by all parties in this suit, and has since been satisfied. His rights, therefore, are not submitted for adjudication. Of the other defendants, Mr. and Mrs. Geo. Nicholson (who claim title under A. M. Holbrook), is demanded twenty of fifty-one equal parts in the establishment known as the "Picayune Newspaper & Printing Establishment," with an accounting and decree for profits. The facts, which are either admitted in the voluminous pleadings or established by the evidence, are as follows:

On the 19th day of December, 1873, there existed in the city of New Orleans a corporation known as the Herald Printing Company, which at that date bought at sheriff's sale, on a twelve months' bond, for the price of \$20,100, the New Orleans Picayune Newspaper and Printing Establish-

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ment, giving as a surety upon the bond Joseph Hernandez. Ex-Gov. H. C. Warmoth induced Mr. Hernandez to go upon the bond, agreed to hold him harmless for so doing, and seems to have been the party really furnishing the security. The Herald Printing Company was a corporation in which the complainant and Alexander Walker were largely interested, and it published a newspaper called the New Orleans Herald, of which these last named gentlemen were editors and managers.

Chiefly through the influence of Warmoth an agreement was formed and carried out, in accordance with which the Herald Company conveyed the Picayune establishment, recently purchased, to A. M. Holbrook, who agreed to pay the twenty thousand dollar twelve months' bond, and a new corporation was formed, under the general law authorizing the same, called the "New Orleans Picayune Printing Company, to print and publish a newspaper or newspapers, and carry on a printing and publishing business of every kind."

To this corporation Mr. Holbrook was to convey, and did convey, the Picayune establishment, derived from the Herald Company, which constituted its capital, fixed by its charter at \$30,000, and divided into one hundred and twenty shares, at the par value of \$250 each. Of these shares A. M. Holbrook was to receive, and did receive, sixty-five shares, the complainant fifteen shares, and Alexander Walker ten shares. The complainant and Walker, along with all the other stockholders, received shares in the Picayune establishment in the same proportion as they had held shares in the Herald undertaking. The Herald was no longer published, and became merged in the Picayune, which last was to be conducted under the new charter. That charter provided that "the corporation shall be governed by a board of directors of five persons."

The first board of directors was declared to consist of A. M. Holbrook, Peter St. Armand, R. W. Holbrook, Alexander Walker and E. C. Hancock (the complainant). The board of directors had, by the charter, power given them "to

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adopt such by-laws as may be necessary to manage the company, and appoint such officers and clerks as may be required." It seems to have been distinctly understood, not only that A. M. Holbrook should thus have a majority of the stock, but that of the five directors, who were to serve for at least one year, and who were named in the charter, two should in some sense be representatives of him, namely, Mr. Armand and R. W. Holbrook (his brother), to each of whom was transferred one of A. M. Holbrook's shares. The corporation went into operation, then, with three directors, who held shares as follows: A. M. Holbrook, sixty-three shares; Peter St. Armand, one share; R. W. Holbrook, one share; E. C. Hancock, fifteen shares; and A. W. Walker, ten shares. The persons who held the remaining shares were named in the charter, though all the certificates do not seem by the stock-book to have been issued. The complainant subsequently derived title to two shares by purchase—one from D. P. Penn, and one from the estate of William P. Harper, and three were donated to him by holders who were personal friends. The charter bears date December 19, 1873. There seems to have been an understanding on the part of the complainant and Walker, which is corroborated by Warmoth, that Walker was to be chief editor and complainant the managing editor, and A. M. Holbrook the business manager. But unfortunately this understanding was merely verbal, and was not recognized by the terms of the charter, which placed all these matters under the control of the directors; and on December 26, 1873, a set of by-laws was enacted, all of the directors being present, and all voting in favor of their adoption except the complainant, which clothed the president (A. M. Holbrook) with authority to "organize the various departments of the paper, and employ and discharge all editors and employees, and fix their salaries, and to have the general supervision of all the operations and transactions of the corporation." This action of the directory disclosed how wide was the misunderstanding between complainant and Walker on the one part, and A. M. Hol-

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brook, who was sustained by the charter, on the other part.

On the 16th day of December, 1874, the twelve months' bond for \$20,100 was to mature. Shortly before this time A. M. Holbrook announced to all concerned his inability to pay the bond, and his determination that the property purchased with the bond should be used in the payment of the bond. Through Warmoth offers were made from Holbrook to Walker, that if he or any of his friends would pay the bond, they should have the Picayune. This Mr. Walker was unable to do. Mr. Aroni, as the counsel of some one, at one time offered to make the payment and take the property, but subsequently withdrew the offer.

On December 14, 1874, the majority of the board of directors, the complainant not being present, and Mr. Walker voting nay and protesting, passed a resolution to the effect that if Mr. Hernandes would pay the bond he should have conveyed to him the Picayune establishment. On the following day Warmoth, through Hernandes, paid the bond and received the conveyance. The amount paid was \$20,211. On the 22d of December, 1874, a special meeting of the stockholders, called by the directory, passed resolutions ratifying the action of the directors in making the conveyance to Hernandes in payment and settlement of the twelve months' bond, and dissolving the corporation. Shortly after such dissolution, Hernandes, acting for Warmoth, sold and conveyed the entire Picayune establishment to A. M. Holbrook for his promissory notes, amounting to \$27,500, falling due in monthly instalments, the last not maturing for several years, and bearing interest at the rate of six per cent. per annum.

Two promissory notes had been given by A. M. Holbrook to Warmoth for debts due from the Herald Company to him, and for his services in connection with the paper. These notes were given at the time of the formation of the Picayune corporation, in or about December, 1873, and had no connection with the transfer to Holbrook; and though it is evi-

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dent they were paid with more readiness by him after the action of Warmoth in making such transfer, or rather that resistance to their collection was withdrawn, they existed long before as the obligations of Holbrook, and have no bearing upon the case, and may therefore be dismissed from further consideration.

The first question to be considered is, whether the conveyance of the Picayune establishment, executed under the authority of the board of directors and ratified by a meeting of the stockholders, was valid, and could and did, in law, convey title to Hernandes. It is not necessary, in the view I take of this case as exhibited in the record, to do more upon this point than to see that the meeting of the stockholders was lawfully convened and regularly constituted; for since this meeting ratified the sale and transfer, and since the members or shareholders are the real principals or constituents of the corporation, if what they did was within the scope of their capacity and was regularly done in time and manner, it would be conclusively the action of the corporate body. The Herald Company had given a twelve months' bond, in amount upwards of \$20,000, for this very property, and then the same corporators, with the same proportionate interests, had added a new corporator, A. M. Holbrook, and changed the name of the corporation, using the purchased property as a capital. As between the bondholders and the new corporation, to the extent of the purchased property, the bond was surely enforceable against that corporation. The collateral undertaking of Holbrook to pay the bond did not at all affect these relations. The debt was the debt of the New Orleans Printing Company. Indeed the bill of complaint concedes this. At paragraph twenty-three complainant says:

"For this petitioner avers and admits that in equity and good conscience, and notwithstanding the fraudulent and illegal combinations and transactions of said A. M. Holbrook, Joseph Hernandes, George Nicholson, Peter St. Armand and R. W. Holbrook, nevertheless the said New Orleans Picayune Printing Company, and the holders and owners of the remain-

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ing fifty-one shares of stock thereof, owed to the said Joseph Hernandez, or his legal assigns, the amount in money which the said Joseph Hernandez paid for the discharge of the twelve months' bond aforesaid, upon which said Hernandez was surety aforesaid, but which was primarily the debt in equity and good conscience of the New Orleans Pica-yune Printing Company, as successor of the Herald Company, which corporation was legally the principal on said bond."

The thing done, then, was for a corporation at a meeting of stockholders to sanction and ratify the application of its property to the payment of its sole debt. It has been urged by the complainant that the board of directors was constituted so that of five A. M. Holbrook controlled three. But it cannot be denied that a board of directors, who are specially designated by name in the charter of the corporation, have authority to call a meeting of stockholders. A board of directors thus designated convened the stockholders who acted upon this subject. At this meeting ninety-one shares were present and voted for the ratification. The stock-book of the company shows that the persons so present and voting were the representatives of genuinely issued stock. So far as relates to the question of the competency of the stockholders to make the ratification, it is immaterial to inquire how much of this stock A. M. Holbrook owned, provided he actually owned it. This question may be material in another aspect of the case, which I shall consider further on, namely: What consequences in equity and law would follow after he acquired the property? But there was nothing in the fact that he owned the majority or the entirety of the stock present and voting, provided he had acquired it in the prescribed manner, and actually owned it, which would detract from the force of the vote.

If it were necessary to decide whether, and it should be decided, that, upon Holbrook's default in the payment of the bond, the sixty-five shares of the stock first received by him had in equity reverted to the corporation, and therefore

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should be treated as not voting, the case would stand thus: There were originally one hundred and twenty shares, only one hundred and nine of which had been issued. McComb had surrendered his four shares to the corporation; so that counting all as issued, which I think should be done, we have, beside the sixty-five shares, twenty-six other shares present and voting aye. There being but one hundred and sixteen shares, there could have been only twenty-five outstanding shares, issued and unissued, which did not assent to this transfer, and the twenty-six shares assenting constituted a majority of the stock, even after excluding the sixty-five shares.

What are the powers of stockholders, and of a majority of stockholders, under our statute and at the common law? The Revised Statutes (Voorhies' ed.), 687 (Acts of 1852, p. 130, 5), provide that "it shall be lawful for the stockholders of any corporation, at a general meeting convened for that purpose, to make any modifications, additions or changes in their act of incorporation, or to dissolve it, with the assent of three-fourths of the stock represented at such meeting." Here is authority so broad that it cannot be questioned, that it includes much more than the appropriation of all the property of a corporation to pay a debt which it owed; and the vote was not only three-fourths, but *all* of the stock represented at the meeting. At the common law, the right of the majority of the stock to control the operations and winding up of corporations like this, not of a public character, is undoubted.

In *Pratt v. Jewett*, 9 Gray, 34, a majority in number of stockholders, owning a minority of stock, petitioned for a dissolution of a manufacturing company. In their petition they averred, among other things, that "a sole owner of a majority of the stock had for many years controlled the election of officers, and elected himself agent and clerk, and that he had for a long time managed the business according to his own will and choice, regardless of the wishes and interests of the petitioners; that according to his statement

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the corporation had been doing a losing business for years; and that he refused to make any change in the business, or to purchase the shares of the petitioners." The court answered that no sufficient reason was shown for a dissolution of the corporation; that "Jewett, owning more than two-thirds of the stock, was entitled to the control; that the true misfortune of the petitioners seemed to be that they are in the minority, and cannot control the majority of the stock."

In *Treadwell v. Salisbury Manuf'g Co.*, 7 Gray, 404, the court say:

"We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if, in the exercise of a sound discretion, they deem it expedient to do so. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity." See also authorities cited.

Although the act of transfer was within the capacity of the members of the corporation, and their sanction to it was in legal form and effective, and Hernandez took title under it, and gave title to A. M. Holbrook, this does not necessarily conclude the complainant, or close the door to relief in his behalf.

There remains the vital question, whether the transfer from the corporation to Hernandez was effected in fraud of the complainant's interests, or whether, by his own conduct with reference to the publication of the Picayune newspaper, the transfer was rendered justifiable and expedient. On behalf of the complainant, it is claimed that A. M. Holbrook received sixty-five shares of the stock in consideration of his agreement to pay at maturity the twelve months' bond; that large powers were given to him in the board of directors in consideration of the same agreement; that when he suffered default to be made in the payment of the bond, and per-

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mitted the publishing establishment to be applied to its satisfaction, he violated a *quasi* trust; and that upon his purchase of the establishment, he must be treated as holding it in trust for the complainant to the extent of his former proportionate interest. On behalf of the respondents, it is claimed that all of the stock, except that held by the complainant, has for a long time been owned by them; that the reason of the sale to Hernandez was not any wish or purpose to defraud the complainant, or any of the stockholders, but that the cause which necessitated it was the incurable dissensions between Walker, A. M. Holbrook and the complainant, and a continued refusal on the part of complainant to comply with the charter and by-laws made in pursuance thereof, so far as related to the conduct of the paper; and that in consequence of this dissension on the part of those in interest, and the defection of the complainant, the paper became so crippled financially that it was impossible for A. M. Holbrook to pay the bond at maturity, and the only wise disposition of the paper that could be made in the interest of all the corporators was to apply its entire establishment to the payment of its sole debt.

As furnishing aid in solving this question, it is important to determine whether the sale to Hernandez was made in order to enable a disrupted corporation to dispose justly of its assets in payment of its debt, or whether it was a step in a fraudulent scheme to convey the property through Hernandez to Holbrook. The action of Warmoth would fairly indicate the controlling purpose of the movers, as his liability to indemnify Hernandez for his becoming security on the \$20,000 bond must have led him, and his intimate relations with both Holbrook and Hernandez must have enabled him, to know thoroughly the transaction from beginning to end. His action in this matter stands for that of Holbrook. He (Warmoth) testifies on this subject, that, after learning of Holbrook's inability to pay the bond, he informed Alexander Walker — who, it must be remembered, stated in his protest against the conveyance to Hernandez that he represented the

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entire non-assenting stock, including all of complainant's—"that if he, or any of his friends, would pay the bond, they should have the property, namely, the Picayune establishment. At one time he said he would pay the bond and take the property, which he never did." This is confirmed by the testimony of Walker.

If Holbrook had proposed to defraud and to acquire title by having the bond enforced, would he have gone to those whom he is charged with compassing to defraud, and offered the coveted title upon payment of the bond? It would be extremely difficult to reconcile this offer with any conspiracy to defraud the complainant or Walker, or with any scheme to secure the property for Holbrook, or with any other purpose save that of judiciously closing up an enterprise which, from incurable discord, had to be abandoned as a failure. Holbrook's purchase of the additional stock is reconcilable with the same purpose, stimulated by a desire, by payment of Hernandez' bond through the assets of the company, to relieve himself from a loss which he felt the fault of others, including complainant, would more justly place upon them than him. The charter placed the control of the whole business in the hands of the directors, and they, by their by-laws, gave the editorial and business management into the hands of A. M. Holbrook, the president. Though this may have been distasteful to the complainant, since done in accordance with the supreme and organic law of the corporation, it constitutes no good ground of his withdrawal of his aid and co-operation from the joint enterprise. There could be no prior understanding between members of a corporation which could prevent the supremacy of its character as constituting the rule for its operations, and the law for its members.

Still, the complainant seems to have been so impressed with the idea that the adoption of the by-laws of December 26, 1873, which gave the supervision over the editors to the president, was a violation of the understanding with which he had entered into the corporation, that he states in his testimony that "he felt from that time that he could not

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attend any meeting of the board of directors, or assume any connection with the Picayune, without condoning a fraud and jeopardizing his own interest and those of other stockholders of the paper. He stood ready to resume his post as managing editor, and never refused to perform any duty in that line." The fact of this position of resistance to the by-laws upon the part of the complainant is stated by nearly all witnesses who testify on the subject.

Alexander Walker says: "Mr. Hancock never attended any meetings of directors but one or two, and he retired from the board and retired from the establishment, and I never saw him or held any consultation with him during the year following." He says also: "We of the Herald Company had been exceedingly dissatisfied with the assumption of the entire control of the establishment by Mr. Holbrook."

St. Armand, though on the cross-examination he seems to have derived much of his information from Holbrook, expresses the opinion that the paper became a source of loss in its publication, and that it became such in consequence of a want of cordial assistance from the complainant and Walker.

Warmoth, who was the friend of the complainant, of A. M. Holbrook and of Walker, who had the fullest opportunity of knowing of their relations and conduct in connection with the newspaper, as well as of the facts concerning the newspaper itself, says that about the time the twelve months' bond was falling due, Holbrook informed him he could not pay it. He further testifies: "He (Holbrook) and Hancock and Walker, who were by agreement to be managers and editors of the Picayune newspaper, under the control of Holbrook, had disagreed. Each one wanted to have the whole control of the editorial department. In consequence of this Hancock did not give the aid which was expected, nor the countenance and assistance which was so necessary to the success of the paper. He was an able and influential newspaper man, and his defection

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was a serious drawback to success, and the enterprise eventuated in a failure."

Upon cross-examination he gives the language which each of those gentlemen used with reference to the other. It evidenced such total distrust and such bitter personal feeling that successful joint action on their part in any business was beyond reasonable expectation.

Concert of action between partners, and confidence each in the other, would be essential in any business, but absolutely necessary in the business of conducting and publishing a daily newspaper, in which such practical sagacity and untiring vigilance are demanded, in which one day of inaction or ill-advised action in consequence of dissension on the part of managers might entail irreparable pecuniary loss upon proprietors. The testimony of Warmoth, thus corroborated, establishes the continued dissension on the part of these three leading newspaper men, the withdrawal of the complainant, and the damaging effect of this upon the interests and prospects of the newspaper. The testimony as to the value of the Picayune establishment is to be considered with reference to these facts. The witnesses vary in their estimates, ranging from \$5,000 to \$100,000. But it is clear that unless the internal obstacles could be removed the paper could have had but little value beyond the type and material. A year previous it had been sold for \$20,000 on a twelve months' credit. Fourteen months afterwards it was appraised in the succession of A. M. Holbrook at \$30,000. At the time of the sale to Hernandes, it was offered by Warmoth to those in interest for the amount of the bond, less than \$21,000, and no purchaser could be found. Warmoth testifies that he regarded the long notes of Holbrook for \$27,500 as worth scarcely more than twenty-five per cent. of their face. The estimate of witnesses cannot outweigh these facts, and the question before the court is as to the wisdom of the sale with reference to a corporation situated in its internal relations precisely as this was; that is, rent and paralyzed by serious and unabating animosities and differences on the

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part of those who were its directors and sources of chief energy.

Under the circumstances, the sale on the part of the stockholders was justifiable and judicious. It would have been utter ruin to continue the publication of a paper so situated — ruin for all concerned. The language of the supreme court of Massachusetts in *Treadwell v. Salisbury Manuf'g Co.*, 7 Gray, 393, may with propriety be adopted as decisive of this question. The court say: "Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property and the closing of the business of the corporation was justified by the condition of their affairs. Without available capital and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable."

But it is urged by the solicitor of the complainant that Holbrook was acting as and with the responsibilities of a trustee, and when he purchased the property he held it in trust for the complainant to the extent of his former proportionate interest in the corporation. Holbrook had undertaken to pay the twelve months' bond, and he failed to perform his undertaking. True, he did fail in carrying out that undertaking, and the property of the corporation was applied to pay a debt which, as between it and Holbrook, belonged to him to pay. But it is established that Holbrook's inability to pay the bond, and the inability of the corporation to prosecute profitably its corporate business, resulted largely from the continued refusal on the part of the complainant to acquiesce in the charter, and from discordant views and action in which complainant largely participated. In consequence of this, an enterprise which the testimony shows might have been advantageous both to complainant and Holbrook, was rendered a failure, and Holbrook, who had received nothing but the sixty-five shares of stock, allowed that to pass, with that of other holders, to Hernandez, in payment of a debt which existed prior to his acquisition of the stock. The

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business of the corporation had become a failure, and the court finds that the defection and withdrawal of the complainant from this business, which he was bound to aid and assist, was to a large extent the cause of the failure. Under these circumstances, the complainant cannot urge as a cause of action in a court of equity, that Holbrook restored to the corporation all he had received, placed it, so far as possible, *in statu quo*, and did not prevent the application of its property to the extinction of an obligation which had existed before he had any connection with it.

The complainant has failed to establish his cause, and the decree must be that the bill be dismissed.

LILIENTHAL AND OTHERS V. WASHBURN.

1. On final hearing of a suit in equity, *ex parte* affidavits taken before the cause was at issue cannot be admitted in evidence, especially where there has been no tender of the affiant for cross-examination, and no notice of an intention to offer the affidavits at the hearing.
2. A document under private signature cannot be admitted in evidence until its execution has been proven.
3. Where it appeared from the bill, which was sworn to, that the court had jurisdiction of the case, and a sworn plea was filed which admitted the material averments of the bill, but stated facts on which the jurisdiction was denied, but to sustain which no competent proof was offered, and there was no other defense, *held*, that there should be such decree for complainant as was warranted by the averments of the bill.

FINAL HEARING IN EQUITY.

Mr. J. R. Beckwith, for complainants.

Messrs. C. S. Rice and W. S. Benedict, for defendant.

PARDEE, Circuit Judge. Joseph W. Swan of New Castle-on-Tyne, England, Claude L. Lambert of Paris, France, and Theodore Lilienthal of the city of New Orleans, bring their bill of complaint against William W. Washburn, a resident of the District of Louisiana, setting forth, among other things,

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their ownership of certain patented processes for printing photographs, the value and novelty of these inventions, and allege that the defendant Washburn is infringing on their patent rights. The complainants pray for an injunction *pendente lite* and for an account and damages and a perpetual injunction. On notice and hearing a temporary injunction was allowed and issued.

On March 1, 1880, the defendant filed a plea in substance as follows:

That as to the alleged rights of the co-complainants of Theodore Lilienthal in the averred patents, and their sale thereof to said Lilienthal as averred, and the validity, use and effects of said averred patents, this defendant makes no contest; but he maintains that he has rights under contract in the use of said patents; that said contract emanates from said Lilienthal, one of the complainants, under date of January 4, 1879, to B. & G. Moses and their successors, and by said B. & G. Moses to this defendant as their successor, on July 23, 1879, on file herein; that the co-complainants of said Lilienthal have no interest therein; that said Lilienthal was and is a citizen of the state of Louisiana, where the bill of complaint was filed, and this defendant is and was at the same time a citizen of the state of Louisiana, and this court is not the proper court to take cognizance of the averred rights of said Lilienthal, and has no jurisdiction in the premises.

To this plea complainants, on March 10, 1880, filed a replication. On June 8, 1881, solicitor for complainants filed a motion for a final decree, on the grounds that by the plea the main facts of the bill were admitted, and that more than one year since issue was joined on said plea had elapsed, and that defendant had taken no proof in support of his plea, and had obtained no extension of time to take evidence under the rules of the court. On June 15, 1881, on motion of solicitors for defendant, the plea was set down for trial on June 18, 1881. On June 16, 1881, solicitor for complainants filed an affidavit in support of his motion for final decree. On June 18th the cause was continued, and on June 21st

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the plea and motion were set down for trial at the same time.

On the trial the solicitors for defendant offered in support of his plea a writing under private signature, purporting to be an assignment of certain patent rights from Lilienthal to B. & G. Moses; a writing under private signature to the same purport from B. & G. Moses to defendant Washburn, which had been acknowledged before a notary and two witnesses by the makers thereof; and a number of *ex parte* affidavits taken prior to the filing of the plea, and the joining of issue thereon. All of the above had been offered and filed in the case on the hearing for a preliminary injunction. No notice of any intention to offer affidavits on the trial of the plea was shown to have been given to the complainants. The complainants filed at once a motion to suppress all the documents offered on various grounds, namely, for insufficiency of attestation, for want of notice, and for their *ex parte* character.

The first question presented to me is on the motion to suppress. Under the sixty-seventh, sixty-eighth and sixty-ninth rules in equity, it is doubtful whether, on the trial of an issue such as is tendered in this case, *ex parte* affidavits can be tendered at all. If they can be, then it must be on notice to the adverse party and the tender of affiant for cross-examination.

“Witnesses who have made affidavits or been examined *ex parte* before the examiner, are liable to cross-examination at the hearing. And when a party has given notice to read an affidavit, he will not be allowed to withdraw the affidavit and so prevent cross-examination. No affidavit or deposition filed or made before issue is joined in any cause, will, without special leave of the court, be received at the hearing thereof, unless, within one month after issue joined, or such longer time as may be allowed by special leave of the court, notice in writing has been given by the party intending to use the same, to the opposite party, of his intention in that behalf.” 1 Dan. Ch. Pr., 888, 889.

The writing under private signature between Lilienthal

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and B. & G. Moses is certainly not admissible until its genuineness is established. The contract between B. & G. Moses and Washburn having been acknowledged by the parties before a notary and two witnesses, may have the same effect as an authentic act, and prove itself (see Rev. Civil Code, art. 2242); but it is immaterial, as it concerns only the parties to the act. The motion to suppress should be allowed as to all but the last mentioned document.

The case thus stands on the issue joined on the plea without evidence in support save the oath of Washburn to his plea and the contract between B. & G. Moses and Washburn; and the question is presented whether this court, being by the sworn allegations of the bill fully vested with jurisdiction in the cause, is ousted of jurisdiction by the unproved plea of respondent that he has rights under contract in the use of said patents emanating from one of the complainants; that the other complainants are without interest, and that the parties in interest are both citizens of Louisiana.

The defendant relies entirely on the case of *Hartell v. Tighlman*, 99 U. S., 547. In that case the want of jurisdiction was held from the averments of the bill, which set forth a contract of license, and by a divided court. If the plea in this case were proven, the case might stand as well as that of *Hartell v. Tighlman*; but not being proven, it would seem necessary to overrule it.

The case of *Littlefield v. Perry*, 21 Wall., 205, appears to come nearer this case on the question of jurisdiction. In that case there was a dispute between the assignor and assignee of a patent, not contesting the validity of the patent, and all the parties were citizens of the same state, and a unanimous court maintained jurisdiction. At all events, I am satisfied that the plea in this case should be overruled. The plea having admitted the main facts alleged in the bill, and not being proved as to matters alleged in avoidance, the complainants are entitled to a decree as though the bill had been confessed or admitted. See *Kennedy v. Creswell*, 101 U. S., 641. I allow the final decree more freely because I am

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satisfied that the matters set forth in the plea filed constitute the only defense the defendant has; and I am further satisfied, that, if proven to its fullest extent, the complainants would still be entitled to a decree.

The alleged license from Lilienthal to B. & G. Moses would probably be held to be personal and local, and not assignable. See *Troy Iron and Nail Factory v. Corning*, 14 How., 193; *Rubber Co. v. Goodyear*, 9 Wall., 788; *Emigh v. Chicago, etc., Railroad Co.*, 2 Fish, 357.

The wording of the alleged contract shows the intention of the parties to make the license local and personal. The stipulation at the end of the agreement looks to a further license from Lilienthal in case B. & G. Moses should sell out or move. But be that as it may, the Swan patent set forth in the bill is not referred to in the document.

The decree is that Lilienthal is the owner of the Lambert process; that Washburn has infringed upon his rights and must account for the profits which have accrued to him thereby, and that an injunction issue restraining the further use of the patent in controversy.

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In a case where the testimony was conflicting, there had been two concurring verdicts, the first of which had been set aside as against the weight of the evidence. *Held*, that the court ought not to grant a second new trial on the same ground, there being no offer to produce new testimony.

HEARD ON MOTION FOR NEW TRIAL.

Messrs. J. P. Horner and F. W. Baker, for plaintiff.

Messrs. J. H. Kennard, W. W. Howe and S. S. Prentiss, for defendant.

BILLINGS, District Judge. This case is submitted on an application for a new and third trial, and to set aside the second of two concurring verdicts. In the matter of grant-

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ing new trials and setting aside verdicts, the circuit courts are governed by the statutes of congress (1 St. 83, sec. 17; R. S., sec. 726); and where there has been a trial by jury, "are restricted to reasons for which new trials have usually been granted in the courts of law." The question, therefore, is one of usage in the common law courts. One verdict has already been set aside as being against the weight of testimony. The question now is, whether a second verdict, upon substantially the same testimony, shall be set aside. There is, I think, a well settled rule that in such a case the court will defer to a second verdict.

In *Swinnerton v. Marquis of Stafford*, 3 Taunt., 232, Lord Mansfield held that, although the judge who last tried the cause thought the evidence against the verdict preponderated, nevertheless, when the evidence was conflicting, the court ought to refuse to grant a second new trial; Lord Mansfield remarking that "it could never be right to make no weight of two verdicts in order to take a chance of a third." See also, to the same effect, *Fowler v. Aetna Fire Ins. Co.*, 7 Wend., 270. There undoubtedly are cases when it should be the duty of the court to set aside any number of verdicts. But those are cases in which juries manifestly disregard the rules of law as given to them by the court. But this is not such a case. The question here is one of fact, viz., the good faith or reality of a claimed transfer of a promissory note. When two successive verdicts are contradictory, and the last is unsatisfactory to the court, a new trial may be ordered. *Parker v. Ansel*, 2 W. Bl., 963. It may also be done after two concurring verdicts. *Goodwin v. Gibbons*, 4 Burr., 2108. But this is seldom done. *Clerk v. Udall*, 2 Salk., 649; *Chambers v. Robinson*, 2 Strange, 691.

The new trial is refused.

The Choteau.

THE CHOTEAU.

1. Salvors will not be allowed compensation for salvage services rendered against the will and protest of the master of the boat saved.
2. Salvage will not be allowed when the labor of the salvors was of no benefit, nor will the salvors be allowed costs if it appears that they were acting in bad faith and were seeking merely to create a claim for salvage.

ADMIRALTY APPEAL.

Mr. M. M. Cohen, for libelants.

Mr. A. Micou, for claimants.

PARDEE, Circuit Judge. In this case I have found no necessity to elaborately find and write out the facts. There is disagreement only on two points: 1. Whether the Choteau rang her bell rapidly for assistance. 2. Did the Protector get her line aboard the Choteau and throw any water on the fire and render assistance? The fact is that the Protector's captain, hearing of the fire and hearing a bell ring, ran his boat alongside the Choteau and attempted to assist in quenching the fire, but his offers of assistance were rejected and his attempts prevented by the master of the Choteau, who was able and willing to and did take care of his own boat. Salvors cannot force themselves upon vessels in distress against the will of the master. It is at his option to accept their services or not, and if he refuse them, compensation cannot be recovered for assistance subsequently rendered against his will. *The Brig Susan*, 1 Sprague, 499. The salvors have no right to act against the will of the master. *Clarke v. The Brig Dodge Healy*, 4 Wash., 651; *The Bee*, Ware, 336.

When services are rendered without any beneficial result, no salvage can be allowed. *Hand v. The Elvira*, Gilp., 60; Conkling's Adm., 280; *The Whitaker*, 1 Sprague, 282; *Clarke v. The Brig Dodge Healy*, *ubi supra*.

Under this state of facts and these authorities, libelants have no claim for salvage against the Choteau; nor do I think that, under the general facts of the case, libelants are entitled to any allowance for labor and expense in going to

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the assistance of the Choteau. It was in the port of New Orleans. The Protector's sole business is as a salvage boat. She is owned and run by an incorporation of insurance company presidents for harbor protection. The crew are under pay for such service with a contract waiving salvage. The boat had steam up, ready to go to any point. The boat is of iron, and neither she nor her crew ran any risk. Besides, in trying to aid the Choteau against the will of her master, the captain and crew of the Protector were violent and aggressive, and apparently disposed to lay the foundation for a salvage claim. See *The Stratton Audley*, 3 Mar. Law Cas., 285.

The proctor for libellant has made a vigorous effort to recover costs or to divide them. There is no doubt the question is within the discretion of the court. The good faith of parties should be considered among other matters. In the court below the decision was against the libellants, and the judge seems to have doubted the good faith of the parties from the incipency of the suit, and gave costs as well as judgment against them.

On the appeal this court substantially coincides with the district judge. The claimants have been at considerable necessary unavoidable expense on account of this action, which has no merit. They should not be saddled with the costs besides. Let the libel be dismissed with costs.

OGLESBY AND ANOTHER V. SILLOM AND HUSBAND.

A subpoena in chancery against a married woman may be served in Louisiana at the domicile of the husband, there being no legal separation between him and his wife.

IN EQUITY.

Messrs. Robert Mott and H. B. Kelly, for plaintiffs.

Messrs. E. M. Hudson and Walker Fearn, for defendants.

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BILLINGS, District Judge. This suit is instituted to foreclose a mortgage executed by a married woman upon her property. The first question is as to the validity of the service of the subpoena. The service was made at the domicile of the husband, there being no legal separation. This is a valid service upon the wife, according to the rules in equity of the supreme court, and according to our Code of Practice. The rule of the supreme court undoubtedly refers the question of domicile to the laws of the state, and the separation in fact does not prevent the husband's domicile being that of the wife. The service is therefore legal, and Mrs. Sillom is properly called upon to answer. In fact, this defendant, who is a married woman, has lived in France for the past seventeen years, although the legal domicile of her husband, and consequently that of herself, is within this state. Though the service is legal, and brings her before the court, the time which should be allowed her to consider in a cause should be determined by her actual residence, and should be sufficient to enable her, as to matters of fact, to communicate with her solicitors. The question here being whether a receiver should be appointed to administer a plantation, and the proof being that it is well administered; and further, it being impossible that any crop can be taken from the plantation until late in the autumn,—there is little risk of damage to the complainants in allowing reasonable delay for the purpose of suitable preparation on the part of the real defendant, whose interests are distinct from those of her husband.

It is therefore ordered that the hearing of the application for the appointment of a receiver be continued to the third Monday of November.

National Bank of New Orleans v. Bohne.

FIRST NATIONAL BANK OF NEW ORLEANS V. BOHNE AND
OTHERS.

1. Where, pending a suit, the defendant dies, and his heirs are made parties and judgment rendered against them, the opening of the succession, the administration of the personal property and the homologation of the accounts, before the judgment was rendered, cannot be set up by the heirs as *res judicata* to a bill filed by the judgment creditor to subject the real estate of the decedent to the satisfaction of the judgment.
2. Where there is not an adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the state in the state courts.
3. Article 1013 of the Civil Code, which makes an heir who has accepted the estate liable for the debts of the succession, unless, before acting as heir, he files an inventory of the succession, or accepts with benefit of inventory, does not apply when a full inventory of the effects of the succession has been made and filed by a tutor who has administered them.

IN EQUITY. Heard upon the sufficiency of pleas.

Messrs. J. D. Rouse and Wm. Grant, for complainant.

Mr. J. S. Whitaker, for defendants.

PARDEE, Circuit Judge. In 1872 the First National Bank of New Orleans sued A. Bohne, a stockholder, for \$2,000 and interest, the same being for twenty shares of the stock. The suit was put at issue. On August 13, 1873, A. Bohne died, and before the end of the same month his wife also died. Their successions were opened in the probate court. Their eldest son, George C. Bohne, obtained the dative tutorship of the two minor children, Francis and Bertha, took an inventory of the property and administered the successions. In the due course of law the personal property was sold and the debts paid. The tutor filed an account in 1875, and the same after publication was duly homologated. By this account it appears that there were five heirs, to whom was distributed the property of the estate in equal proportions, to wit, the community property, one-fifth to each.

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Pending these proceedings the plaintiffs in this suit, by *scire facias*, made George C. Bohne in his capacity as tutor of the minor heirs, and George C. Bohne as an heir, parties to the suit pending in the United States court. The case was subsequently fixed for trial, and on February 28, 1876, judgment was rendered against George C. Bohne, tutor of the minors Francis and Bertha Bohne, for the amount claimed, \$2,000 and interest, payable in due course of administration. From the date of said judgment to the present time plaintiff has taken no action under said decree.

It is proper to mention that there belonged to the joint estate of husband and wife, one piece of real estate, the homestead of the family, which was community property, valued at the time the inventory was taken in 1873 at \$3,000, and which still remains intact, belonging to the heirs of Bohne, and unsold. It should also be mentioned that after the judgment was rendered in 1876 in favor of the First National Bank, effort was made on the part of the tutor to sell the above described property for the purpose of paying said judgment or any other liabilities of the succession. After sale was made (due proceedings being taken), the probate court, for reasons given in its judgment, refused to confirm the sale.

In August, 1880, complainant, to wit, the First National Bank of New Orleans, brought the present suit in equity, and to these last proceedings counsel for the heirs here opposed the following objections:

(1) That the claim, so far as related to Geo. C. Bohne, Francis I. and Bertha A. Bohne, is *res judicata*. (2) That plaintiff is not entitled to proceed in equity as there are plain, adequate and complete remedies at law. (3) That in no event can a judgment be rendered against the heirs of A. Bohne for any amount beyond that which came to them by inheritance.

In the first and second objections I do not see much merit. This is a suit in equity to subject certain real estate described

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in the bill to the payment of a judgment and enforce contribution from heirs with different liabilities, when the defendants to the bill in their answer "admit that a writ of *feri facias* cannot issue against said property on said judgment, and that it cannot be executed against the successions of said A. Bohne and wife." In such a case it would be strange that an attempt to enforce the judgment by suit should defeat itself on the plea of *res adjudicata*, and it would be equally strange if a suit to subject equities and compel contribution could not be maintained on the equity side of the court. See 1 Story's Eq. Jur., secs. 478, 479; *Garrison v. Memphis Fire Ins. Co.*, 19 How., 312; *Oelrichs v. Spain*, 15 Wall., 211; Ad. Eq., 267. See Louisiana Rev. Civil Code., art. 1427.

The argument of counsel as to the complete and adequate remedies the complainant has in the state courts may be perfectly sound, but complainant has a right to sue in the United States courts, and is not compelled to seek the jurisdiction of the state. In this court he has exhausted his remedy on the law side, and if it can now find any remedy on the equity side, I think we may give it to him.

The third objection seems to me to have force. The two defendants, Francis T. Bohne and Bertha A. Bohne, it is conceded, accepted their father's succession with the benefit of inventory, and are not liable beyond the property received by them. The other three heirs were majors, and accepted the shares falling to them some three years after the successions were opened, and after a full inventory and administration by the tutor of the aforesaid who were minors. Neither of them performed any act as heir until after that inventory and administration. And the facts are not materially altered as to George C. Bohne by showing that he was the tutor administering the estate. Rev. Civ. Code, art. 995.

Now the question for decision is, whether such acceptance as is recited above makes these three heirs liable for their

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respective *virile* shares of complainant's judgment, although in excess of the amount received by them respectively from the successions.

Article 1427 of the Revised Civil Code fixes the liability of heirs to contribute in proportion to the part each has in the succession. Article 1013 makes the heir who has simply accepted liable for the debts of the succession as if he himself had contracted them, unless, before acting as heir, he make a true and faithful inventory of the effects of the succession or has accepted with benefit of inventory.

The formal inventory required by article 1013 and preceding articles was not taken by these heirs, but one to all intents and purposes was taken at the opening of the successions; and the accounts and distribution filed by the tutor and homologated by the court and accepted by the heirs is in itself a substantial inventory.

In the case of *Mumford v. Bowman*, 26 La. An., 413, which was a case brought to make an heir liable on the ground of acceptance, as the party had proclaimed herself heir, and it was claimed, besides, that she had taken possession of succession effects, the court says: "But if she had taken possession, it may be well questioned whether the formal inventory of the succession, made under judicial authority, would not protect her from liability beyond its assets, according to article (1006) 1013, Rev. Civ. Code.

In the case under consideration none of the rights of the complainants have been affected or even jeopardized by the failure to take the formal inventory, and in equity I do not think the court should make them liable for a technical omission injuring nobody particularly, in the light of the doctrine in *Mumford v. Bowman*, above quoted.

CASE, RECEIVER, v. SMALL AND OTHERS.

1. A person who purchases the stock of a national bank with his own means and for his own account, but has it transferred on the books of the bank from the seller to a third person, does not thereby escape the liability of a stockholder for the debts of the bank.
2. The comptroller of the currency has no authority to settle and compound suits brought by the receiver of a national bank, without leave of the court in which the suits are pending.

IN EQUITY. Final hearing.

The case is sufficiently stated in the opinion of the court.
Messrs. J. D. Rouse and Wm. Grant, for the complainant.
Messrs. T. J. Semmes and Rob't Mott, for defendant Small.

PARDEE, Circuit Judge. This is a suit brought by the receiver of the Crescent City National Bank against the defendants, to compel contribution of seventy per cent. on certain fifty shares of the stock of said bank, under the assessment of the comptroller of the currency by virtue of section 5151, Revised Statutes.

It seems that just prior to the failure of the bank, Keenan, one of the defendants, through a broker sold fifty shares of the stock. They were purchased by I. K. Small and paid for by him, as he says, for and on account of his sister, Miss E. M. Small, and were transferred on the books of the bank by Keenan to Miss Small.

The plaintiff claims that this transfer, so far as the putting of the stock in the name of Miss Small is concerned, was a sham, a simulation, and that I. K. Small was the real purchaser; that this simulation was resorted to to avoid the liability of stockholder, under the laws of the United States.

It is shown that Miss Small resides in Maine; that she was spending the winter here, and was and is of no pecuniary responsibility, and was without means of her own to make the purchase requiring \$1,500; that I. K. Small paid the purchase price, and, so far as it appears, has never been reimbursed. An examination of the evidence of I. K. Small,

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taken in a former case in relation to the same stock, and of his answers filed in this case, leave no other conclusion in my mind than that the interposition of Miss Small was a sham, and that I. K. Small was the real purchaser and owner of the stock. In his first examination his answers were evasive, when if the facts had been in his favor they could, and undoubtedly would, have been clear and responsive. Here is a sample:

“Question. Has she (your sister) ever reimbursed you for the payment on this stock that you made? *Answer.* Not entirely. No, sir. *Q.* Has she reimbursed you any part of the payment? *A.* Yes, sir. *Q.* How much? *A.* Well, I don't remember that. *Q.* When did she make any such reimbursement? *A.* I think it was in 1874 she gave me something. *Q.* How much? *A.* It was not very much; it was a small amount. *Q.* Was it ten dollars? *A.* More than that. *Q.* Tell us, as near as you can. *A.* Thirty dollars or forty dollars. *Q.* In what manner did she make such reimbursement to you? *A.* In presents.

Again:

“Question. Now is it not the fact that you bought that stock for yourself, and put it in your sister's name in order to avoid some liability? *Answer.* I bought the stock at that time with her knowledge and consent, and told her of it at the time I bought it. *Q.* Suppose that the bank had not failed, would you have transferred that stock to her, and given her the ownership of it, or would you have considered it as belonging to yourself? *A.* The stock was never transferred at all; it was taken from the broker and given to her; it was never transferred, to my knowledge. *Q.* Did you not buy that stock for your own account, and with the intention of speculating in it for your own benefit? *A.* I told the broker at the time that I bought that stock to put it in the name of E. M. Small. Last question repeated. *A.* It is possible I may have enjoyed some benefit from that stock.”

In the answer filed to the interrogatories in this case defendant Small is not so evasive, but he is by no means as

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candid as he might have been if the actual facts would have warranted. And now, in his answer, he admits to an ownership of one-seventh, which was in nowise hinted at in the first evidence.

In defense it is first urged that the transaction was *bona fide*, and that Miss Small was the real purchaser and owner of the stock. The facts are against this defense.

Next, that I. K. Small, knowing that the bank was in failing circumstances, had a right to donate the money to his sister, and with it purchase the stock and put it in her name.

This is a doubtful proposition, but conceding it, for this case, the facts will not bear out this defense. In the evidence given by Small, above quoted, the purchase was for account of his sister, and she had reimbursed him in part of the purchase price; and, besides, no such defense is pleaded. Then it is urged, as well as pleaded, that the letter of recent date from the comptroller of the currency to Robert Mott, Esq., stating that a final dividend to the creditors of the Crescent City National Bank had been declared, and was now payable on signing receipt and returning certificate of indebtedness, operated in abatement of this suit. I find no authority for this position. The statutes give the comptroller no such authority to so inferentially stop suits. Perhaps he might direct the receiver to discontinue, but to compound and settle claims requires the authority of the court. R. S., § 5234. To discontinue, the direction should be positive.

And, finally, it is argued that under section 5151, R. S., no person can be made liable unless at some time or other he has been a stockholder of record, and been held out to the world as such. The law seems to be settled now that the owners of stock are liable under that section.

At the same time, those persons who hold themselves or allow themselves to be held out as owners of stock are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as apply to partnerships. Real partners

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are liable, though not publicly known as partners, and persons who allow themselves to be held out as partners are liable, though they have no real interest.

The case of *Davis v. Stephens*, decided by Chief Justice Waite, 17 Blatchf., 259, is a case directly in point. See, also, *National Bank v. Case*, 99 U. S., 628.

Let a decree for complainant be entered.

H. & C. NEWMAN v. RICHARDSON AND OTHERS.

LETCHFORD v. RICHARDSON & CARY.

Where one partner fraudulently indorses the name of his firm upon commercial paper in which the partnership has no property or interest, and obtains money upon it, manifestly for his own and not for partnership use, the party with whom he deals is affected with notice, and cannot hold the firm.

ACTION AT LAW.

Messrs. J. Ad. Rozier and V. Z. Rozier, for H. & C. Newman.

Messrs. T. Gilmore & Sons, for Letchford.

Messrs. J. A. Campbell, T. L. Bayne and Henry Renshaw, for defendant.

BILLINGS, District Judge. The facts in the case are as follows: George W. Cary, one of the firm of Richardson & Cary, applies to the plaintiffs for a loan or advance on cotton thereafter to be shipped by his brother, C. W. Cary, of Monticello, Alabama. The plaintiffs demand collateral security. The next morning George W. Cary delivered to them as such collateral security the promissory note upon which suit is brought, which is a note purporting to be made by C. W. Cary, to the order of Richardson & Cary, and was indorsed by George W. Cary in the name of the firm. As a matter of fact, the note was never the property of the firm of Richardson & Cary, and they never had any interest in it, nor had any interest in the transaction in which the loan or advance was made to G. W. Cary.

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In the case of Letchford against the same party the facts are as follows:

George W. Cary, one of the firm of Richardson & Cary, applied to the plaintiff for a loan of \$1,000, to meet a draft that was drawn to make some settlements of the debts of the old house of Wallace & Cary, and upon making the loan the plaintiff received the promissory note upon which suit is brought, which is a note purporting to be drawn by L. Mims, Jr., to the order of Richardson & Cary, and was indorsed by George W. Cary in the name of the firm. Mims was not even a customer of defendants' firm, and they were under no obligation to pay the debts of Wallace & Cary, and had no interest either in the paper delivered to plaintiff nor in the loan to George W. Cary.

These cases are identical in principle. In both cases one partner fraudulently indorses the name of the partnership upon commercial paper in which the partnership had no property or interest, and obtains money upon it from the plaintiff for a purpose manifestly not a partnership purpose. The doctrine upon which partners are held for the actions of each other is the doctrine of agency. Authority is implied whenever the act done is within the scope of the partnership business, or if admitted not to be the act of the firm, then a special authority from the other partners, either expressed or implied, must be shown in order to bind them so far as first parties are concerned. These loans are both made for a purpose not a partnership one. In the one case it was a loan to the brother of George W. Cary, and in the other a loan for the purpose of paying a debt of another firm.

But it is urged that when one of two innocent parties must suffer, that party who has held out to the other a third party as having an authority he did not possess must bear the burden or loss. This is true. But the limit of the application is reached when the purpose or object of the act done is unquestionably not that of the firm. The reason of the limitation is that when a partner attempts to use the firm name

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for a purpose admitted to be outside of a partnership transaction, the party with whom he deals is fairly affected with notice and put upon his guard, and if he fails to make suitable inquiry, occupies in law the same attitude as does any other person who deals with an agent whom he knew, or ought to have known, was exceeding his authority. The laws upon the subject are well nigh innumerable, but the American authorities with great unanimity establish the doctrine that, so far as first parties are concerned, the firm name cannot be used by one member for a purpose confessedly distinct from the firm's business so as to bind the other members, without showing special power.

Judgment must therefore be given in favor of the defendant Richardson and against the defendant Cary.

THE SABINE.

1. The power to control their own process so as to prevent injustice is one which belongs to all courts.
2. Sureties upon a bond given for an appeal in admiralty from the district to the circuit court compromised the decrees rendered against them in the latter court. The principal on the bond appealed to the supreme court, by which the decrees were in all respects affirmed. *Held*, that execution issued against the sureties upon the return of the mandate of the supreme court should be quashed.

Heard upon motions to quash executions.

The original case was a suit in admiralty, brought February 16, 1872, by the owners of the Sabine against the steamboat Richmond, to recover damages sustained by the Sabine resulting from a collision between her and the Richmond, near Twelve Mile Point, on the Mississippi river, on February 11, 1872. The owners of the Richmond filed an answer and also a cross-libel against the owners of the Sabine. In the latter they claimed a decree for damage sus-

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tained, in consequence of the collision, by the Richmond, they alleging that the collision was caused by the fault of the Sabine.

Upon the filing of the cross-libel the district court, by the authority of admiralty rule No. 53, ordered that all proceedings upon the original libel be suspended until the original libelants gave bond to respond in damages to the cross-libel.

In pursuance of this order, on March 14, 1872, the owners of the Sabine, with Alfred Moulton, Jules Tuyes, Charles Cavaroc and Achille Chiapella as sureties, executed a bond of that date in favor of the owners of the Richmond in the sum of \$8,000. By the terms of the bond Moulton and Tuyes each became bound in the sum of \$2,000 only, and they each justified in that amount.

Upon trial a decree was rendered dismissing the libel of the Sabine against the Richmond, but sustaining the libel of the Richmond against the Sabine, and awarding to the owners of the Richmond the sum of \$9,750 for the damage sustained by her, and rendering a decree in their favor against Jules Tuyes and Alfred Moulton for \$2,000 each.

From this decree, an appeal being taken to the circuit court by the sureties upon the bond given by the owners of the Sabine upon the cross-libel of the Richmond, the circuit court on April 10, 1875, rendered a decree in favor of the Richmond against the Sabine for the damages sustained by the former in consequence of the collision.

Afterwards, on March 11, 1876, upon the report of the master, the amount of the damages was fixed at \$8,000, which the owners of the Sabine were condemned *in solido* to pay. At the same time decrees were rendered against Jules Tuyes and Alfred Moulton, sureties on the bond aforesaid, for \$2,000 each.

On July 3, 1876, Jules Tuyes compromised the decree against him in favor of the owners of the Richmond by paying the latter, in full satisfaction thereof, the sum of \$1,166.66,

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and was by them subrogated to their rights as owners of the decree.

The following is a copy of the paper by which this settlement was evidenced:

"Shirley et als., Owners of the Sabine, v. the Richmond.
United States Circuit Court — Received, New Orleans, July 3, 1876, from Jules Tuyes, Esq., security on the bond given by the libelants in the above cause to respond to the cross-libel filed by N. S. Green and others, claimants of the steamboat Richmond, the sum of \$1,166, and in full satisfaction of decree rendered against him in the above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the steamboat Richmond.

"KENNARD, HOWE & PRENTISS,

"Attorneys for owners of Richmond."

Afterwards, September 28, 1876, the Home Insurance Company paid, in behalf of Alfred Moulton, to the owners of the Richmond, the sum of \$1,500, which the owners of the Richmond acknowledged to be in full settlement as a compromise of the liability of Moulton on said bond, signed by him. It was, in fact, a compromise of the decree for \$2,000 which had been rendered against Moulton on said bond.

On November 2, 1876, the owners of the Sabine filed a petition for appeal from the decrees of the circuit court hereinbefore mentioned, upon giving bond to cover costs, which was allowed, and on December 16, 1876, they gave an appeal bond in the sum of \$500. Neither Tuyes nor Moulton joined in the petition for appeal, and neither of them became obligors upon the appeal bond.

At the October term, 1880, of the supreme court the decree of the circuit court of March 11, 1876, was in all respects affirmed, and a mandate was sent down to the circuit court.

After the mandate of the supreme court showing the affirmation of the decree of the circuit court had been entered in the latter court, an execution was issued on the decree

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against Tuyes and Moulton, rendered by the circuit court March 11, 1876, on their bond above mentioned, and affirmed as aforesaid by the supreme court.

The marshal being about to seize the property of Tuyes and Moulton to satisfy the execution, they each for himself filed a motion to quash the execution, on the ground that the decrees against them respectively had been satisfied. Upon these motions the cause was heard.

Mr. C. E. Schmidt, for Jules Tuyes.

Messrs. C. B. Singleton and R. H. Browne, for Alfred Moulton.

Mr. John A. Campbell, for the owners of the Richmond.

WOODS, Circuit Justice. It is insisted by counsel for the owners of the Richmond that the decree of the circuit court, as well that part of it which condemned Tuyes and Moulton to pay \$2,000 each as that part by which the owners of the Sabine were compelled to pay \$8,000 to the same parties, having been affirmed by the supreme court, and the mandate of that court having been received, this court has no discretion, but must execute the decree in all respects as it has been affirmed. The result of this contention would be that Tuyes and Moulton, who had once compromised and satisfied the decrees against them respectively, would be compelled to pay them again. I do not think the law requires of this court a course of administration which would produce such a result. This court is not under all circumstances bound to render a servile obedience to the mandate of the supreme court. It is bound to exercise a judicial discretion in the interpretation and execution of the mandate.

In the case of *Story v. Livingston*, 13 Pet., 373, the supreme court said in reference to its mandate, that "it is to be interpreted according to the subject matter to which it has been applied, and not in a manner to do injustice."

In *Ex parte Morris and Johnson*, 9 Wall., 605, the supreme court having reversed a decree rendered against Morris and Johnson by the district court, by its mandate directed the

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marshal to make restitution to them of whatever they had been compelled to pay under that decree. Pending the appeal the whole amount of the decree had been collected from them by execution. A part of the money so collected had been distributed by order of the court. The residue the marshal had by order of the interior department deposited in a national bank which had failed since the deposit had been made. These facts were held by the supreme court to exonerate the marshal and excuse him from obedience to the mandate of the court. See also *Supervisors v. Kennicott*, 94 U. S., 498.

When the appeal taken does not supersede the decree, and such was the appeal taken in this case, the appellee, notwithstanding the appeal, may take out execution and enforce the payment of the decree. It has never been supposed that money so collected could, after the affirmance of the decree, be again collected. A voluntary payment stands on the same footing.

It is not the practice of the supreme court, in affirming or reversing a decree, to take notice of payments or adjustments subsequent to the decree of the court below. These matters belong to the circuit court to consider after it shall have received the mandate of the supreme court.

Thus in *The Kulorama*, 10 Wall., 204, it was said by Mr. Justice Clifford: "Payments have been made by the respondents since the decree was entered in the district court, but the court here is not asked to revise the finding of the district court as to the amount, nor to deduct the payments since made, as those matters will be adjusted under the stipulations executed between the parties."

So in *South Fork Canal Company v. Gordon*, 2 Abb., 479, it was said by Mr. Justice Field:

"Obedience to the mandate of the supreme court will always be rendered by this court. It will be a prompt and implicit obedience, but we trust it will be, as it should be, an intelligent, and not a blind obedience. The judgments of that tribunal are founded on the records before it, and these

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judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by this record. That such events may modify and often do modify the mode and manner of enforcement is well known to all members of the profession. The death of parties, partial satisfaction, changes of interest subject to judgment, and sales upon the judgment pending the appeal, are instances where this result is frequently produced."

It follows from these authorities, if it, indeed, needed any authority to support so obvious a proposition, that payments or compromises made in his own behalf by a party to a decree after its rendition in the court below are to be noticed and enforced by the inferior court after the affirmance of the decree by the supreme court and the return of its mandate.

It is conceded, however, by counsel for the execution creditors that Tuyes and Moulton are entitled to be credited on the execution with the amounts paid by them in compromise of the decrees rendered against them, but it is insisted that they are entitled to no more.

This concession, it seems to me, yields the whole case.

Tuyes and Moulton insist that the decrees against them have been discharged by accord and satisfaction. The accord and satisfaction is clearly established. It is impossible to hold that they would be entitled to the benefit of full or partial payment, and to deny them the benefit of their accord and satisfaction. Both these methods of satisfying a decree, so far as the question in hand is concerned, stand on precisely the same footing.

But it is insisted that the adjustments made with Tuyes and Moulton were compromises, and that the compromises failed; therefore the appellees were remitted to their original rights, and can collect the balance of their decrees not covered by the compromise payments. It is true the adjustments were compromises, but the compromises have not failed. Those compromises were that the appellees should re-

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ceive a certain sum in full satisfaction of the decree. This was agreed to by the debtors, the money was paid and a release executed. So far from the compromises failing, they were fully executed and performed.

When these compromises were made it was perfectly well known to the owners of the Richmond that Tuyes and Moulton could not prevent the owners of the Sabine from carrying up the decree by appeal. They never agreed that there should be no appeal. They compromised and satisfied the decrees against themselves. They took no appeal, for they had nothing to appeal from. They were out of the case. It is true that if the decree of the circuit court had been reversed, the reversal would have extended to the decree against Tuyes and Moulton. But that would have been of no benefit to them. They could not have recovered back the compromise money voluntarily paid before the appeal in satisfaction of the decree.

No reason is perceived why the execution in question should be allowed to proceed against the property of Tuyes and Moulton. They have both satisfied the decrees upon which the execution is issued. The affirmance by the supreme court of the entire decree of the circuit court does not make this any the less a fact. It would not be just to compel another satisfaction by Tuyes and Moulton. As to Tuyes, he is in fact subrogated to the rights, so far as they have any, of the owners of the Richmond in the decree against himself. If the decree is not satisfied, he is in effect its owner, so that the levy of this execution upon his property is an attempt to compel him to pay a decree which he has compromised and the owners of which have attempted to subrogate him to their rights therein. In short, it is an attempt to enforce, by execution, payment of a decree which, if it is not already satisfied, is the property of the person from whom its payment is to be exacted.

No question is made in reference to the method adopted by Tuyes and Moulton to gain the relief prayed for. The power to control their own process so as to prevent injustice.

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is one which belongs to all courts. *McHenry v. Watkins*, 12 Ill., 233; *Russell v. Hugunin*, 1 Scam., 562; *Adams v. Smallwood*, 8 Jones, 258; *Barnes v. Robinson*, 4 Yerg., 186; *Ascarati v. Fitzsimmons*, 3 Wash., 134; *Davis v. Shapley*, 1 B. & Adol., 54; *Humphreys v. Knight*, 6 Bing., 572. The exercise of this power is invoked by their motions, and there seems to be no good reason why the relief asked for should not be granted.

The motions are allowed.

NOVEMBER TERM, 1881.

NEW ORLEANS GAS LIGHT COMPANY v. LOUISIANA LIGHT &
HEAT PRODUCING & MANUFACTURING COMPANY.

1. When a plaintiff, alleging itself to be a private corporation, brings a suit based on rights depending on its corporate capacity, the defendant may set up as matter of defense that such corporation has no existence in law.
2. Under the act of the legislature of Louisiana, entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," approved December 12, 1874, the Crescent City Gas Light Company, incorporated in 1870, with the exclusive franchise of making and vending gas in New Orleans for fifty years, beginning April 2, 1875, could not be consolidated with the New Orleans Gas Light Company, incorporated in 1835, with the exclusive franchise of making and vending gas in New Orleans until April 1, 1875, when its charter expired.

IN EQUITY. Heard upon demurrer to the bill.

Messrs. Thomas J. Semmes and John A. Campbell, for complainant.

Messrs. John M. Bonner, Henry C. Miller and E. Howard McCaleb, for defendant.

PARDEE, Circuit Judge. This case was heard by argument on the several demurrers, and pleas filed, with the understanding that if the demurrers were overruled, the pleas might be set down or put at issue, as counsel might determine.

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The question in the case is as to the corporate capacity of the complainant, and its right to sue and stand in judgment. As all the facts relating to the corporate capacity of the complainant are either stated in the bill or shown by the exhibits thereto, I think the question can be and is fully raised on the demurrer.

It has been argued that the defendants have no right or interest to attack the corporate capacity of the complainant; that such an attack can only be made by the state through its attorney general; but I am inclined to think that where defendants are sued on rights depending upon the corporate capacity of the complainant, that such corporate rights may be attacked as a means of defeating the suit. The bill shows that the New Orleans Gas Light Company was incorporated in 1835, with the exclusive privilege of making and vending gas lights in the city of New Orleans, which exclusive privilege was to expire, by act of the legislature and decision of the supreme court of the state, on the 1st day of April, 1875; the decision of the supreme court going further, and enjoining the New Orleans Gas Light Company from making and vending gas lights in the city of New Orleans after April 1, 1875.

The Crescent City Gas Light Company was incorporated in 1870 by act of the legislature, and declared to have and be entitled to the sole and exclusive privilege of making and vending gas lights in the city of New Orleans for the term of fifty years from and after date of expiration of the charter of the New Orleans Gas Light Company.

In 1874, the general assembly of the state passed an act entitled "An act to authorize the consolidation of business and manufacturing corporations or companies," approved December 12, 1874, which provides "that any two business or manufacturing companies or corporations now existing under general or special law, whose objects and business are in general of the same nature, may amalgamate, unite and consolidate such corporations or companies and form one consolidated company, holding and enjoying all the rights,

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privileges, powers, franchises and property belonging to each, and under such corporate name as they may adopt or agree upon;" and further providing the manner and mode of perfecting the consolidation. And the bill shows that under this act the New Orleans Gas Light Company and the Crescent City Gas Light Company consolidated, amalgamated and united, under the corporate name of the New Orleans Gas Light Company, on the 29th day of March, 1875. The question raised by the demurrer is whether the said act applied to these two gas light companies, and whether, under that act, they could consolidate and unite.

On the 12th day of December, 1874, was the Crescent City Gas Light Company a business and manufacturing corporation or company? It could not, under the terms of its charter and of the charter of the New Orleans Gas Light Company, make and vend gas light in the city of New Orleans, or manufacture or do business as a gas company, until April 1, 1875, the expiration of the charter and the termination of the exclusive privilege of the latter company. The one company could not live as a business company until the other died as a business company. They were not contemporary business and manufacturing corporations or companies. They were not, in contemplation of law, both in existence as such business and manufacturing companies at the time of the attempted consolidation, and at the date of the law, December 12, 1874, I think it is clear that the Crescent City Gas Light Company was not an existing business and manufacturing corporation or company. How could it at that time be an existing business and manufacturing company, when, without works, pipes or mains, it was not only not doing business and manufacturing, but was prohibited by law from so doing prior to April 1, 1875? And in my opinion the consolidation act of 1874 did not apply to or intend to include any corporations created by the legislature, and endowed with peculiar and exclusive franchises and privileges. From the nature of the case it could not have been intended that when one company was endowed with a monopoly by the law of the land,

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there could be another company existing "whose objects and business were of the same nature." Nor could it have been intended by the said act that the elaborate legislation of 1870, creating the Crescent City Gas Light Company, and the amendatory act of 1873, in relation to the same, was thereunder only to result in extending the charter and monopoly features of the New Orleans Gas Light Company for fifty years, which it is apparent the legislature had neglected, if not refused, to do directly. And it is a very serious question with me whether, if the said two companies could and did unite under the said consolidation act, the life of the amalgamated company could be or was any longer than that of the shorter company so amalgamating.

Under the constitution and laws in 1874, such companies could only be created and endowed by the legislature, and such charters are not extended by implication or intendment.

And it seems to be undisputed law, as derived from the authorities and admitted in argument in this case, that when two companies consolidate under such a law as that of 1874, the old corporations are dissolved and a new corporation created. What is the life of this new corporation? The law is silent. It seems impossible for either corporation to grant a longer life than it has itself. Whence it ought to follow that the life of the new corporation would only be that of the shorter-lived amalgamating corporation. And if that is not the case, as the law is silent, the life of the new corporation is indefinite, and subject to the legislative will; in which latter case the new corporation would be subject to the provisions of the constitution of 1879.

However this may be, I am of the opinion that the law of 1874 did not authorize the consolidation of the New Orleans Gas Light Company with the Crescent City Gas Light Company, and that there is in law no such corporation as the alleged complainant in this case; and that therefore the demurrer filed herein should be sustained. And it is so ordered.

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RUNDEL V. LIFE ASSOCIATION OF AMERICA.

The charter of a mutual life insurance company, organized under the laws of Missouri, provided that upon its dissolution all its property should vest in an officer of that state, who should wind up its affairs. *Held*, that all policy-holders were members of the corporation and had assented to this provision, and that those residing in Louisiana were entitled to no priority of payment out of the assets of the corporation in that state, or to have them retained in the hands of a receiver as security for the amounts due them; but that such assets must be turned over to the officer appointed under the laws of Missouri to settle the affairs of the company.

IN EQUITY. Heard upon pleadings and evidence for final decree.

Messrs. G. A. Breauw, H. H. Hall and H. B. Magruder, for complainants.

Messrs. G. L. Hall, A. Goldthwaite and W. S. Relf, for the superintendent of insurance.

BILLINGS, District Judge. The defendant was a mutual life insurance corporation, created by and domiciled in the state of Missouri, but having agencies and transacting large business under its charter in this state and other states. It has a large fund in this state now in the hands of the receiver in this cause. The defendant Williams is a statutory officer of the state of Missouri, who, according to the charter of the corporation, upon its dissolution had vested in him all its property, and is charged with the duty of winding up its affairs. *Relfe v. Rundle*, 103 U. S., 222. The operation of this statute of Missouri, under the ruling of the supreme court, is that each policy-holder — no matter where he resides — signing the constitution of the corporation, thereby assents to all of the provisions of the statutes of the state where the corporation is created, including that which vests all its property in the superintendent, and gives him authority to wind up its affairs. The corporation has been dissolved, and defendant Williams is in possession of its assets

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in Missouri under a decree rendered in a cause which was commenced prior to this cause.

The contention on the part of the complainants is, that as to the funds in the hands of the receiver the Louisiana creditors have a preference for payment, or at least the right to have them retained here in the hands of the receiver as security that the amount due them will be paid. The claim on the part of the superintendent is that, under the law creating the corporation, the assets, and the whole of them, should, upon its dissolution, pass into his hands as an officer of the state of Missouri.

The Louisiana creditors are such only by virtue of being policy-holders, and the company is a mutual one. They are, therefore, stockholders, liable to become debtors in case there should be a deficiency of total assets over the debts, and capable of becoming creditors in case there should be an excess. As matter of fact in this case, they will be creditors. But they are creditors only by virtue of being members of the corporation. It must be that as members of a corporation they have assented to the laws of the state of its creation, which, upon its being dissolved, control the settlement of its affairs; *i. e.*, they have assented that the officers by whom, and the place and manner in which its assets shall be administered, shall be such as the laws of the state of Missouri prescribe.

There must be a common method by which the amount due by or to each policy-holder shall be ascertained, and this must be done by a common representative. This is the contract to which the plaintiffs bound themselves when they subjected themselves to the operation of the organic law of the corporation by becoming members of it. They cannot, therefore, now ask the court to protect them in the exercise of a right which they expressly relinquished. The effect which is wrought by this contract and assent to the laws of the state of Missouri makes the territorial extent of the authority of the superintendent to administer, coextensive with the authority of an assignee in bankruptcy, or a re-

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ceiver of a national bank, springing from the territorial effect of a national law.

The decree must, therefore, be for the defendant Williams, as superintendent, directing the receiver, Fell, to turn over to him all the property of the corporation to be administered under the laws of the state of Missouri, and remitting the complainants to the court which decreed the dissolution. By reason of the consent which has been given in this cause, it must provide that before this is done all the expenses of the administration up to this time, including the compensation of the receiver, Fell, and the costs in this cause, be paid by the defendant Williams, as trustee.

CRESCENT CITY LIVE STOCK LANDING & SLAUGHTER HOUSE
COMPANY V. BUTCHERS' UNION LIVE STOCK LANDING &
SLAUGHTER HOUSE COMPANY.

Where a corporate body had conferred upon it by its charter the exclusive right to carry on within certain territorial limits the business of slaughtering animals for food, and its business was conducted without offense to the public interests, health, manners or morals, there was no constitutional power in either the legislature or the authorities of any municipal corporation to take away its exclusive privileges.

(Before PARDEE and BILLINGS, JJ.)

Heard upon motion for injunction *pendente lite*.

The facts appear in the opinions of the judges.

Messrs. Thomas J. Semmes and Robert Mott, for complainant.

Mr. B. R. Forman, for defendant.

PARDEE, Circuit Judge. We follow the decision of the supreme court of the state of Louisiana in the case of *Slaughter House Co. v. City of New Orleans*, as reported in 33 La. An., 934, in these propositions:

1. The charter of complainant, act No. 118 of 1869, Louisiana laws, constitutes a contract.

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2. That said charter contains monopoly features.

3. That so far as said act or charter rests upon delegated police power of the state, it may be repealed or impaired by constitutional or legislative authority, without infringing on the constitution of the United States. We concede the validity of article 248 of the Louisiana constitution, delegating a regulation of slaughter houses to the various municipal authorities. We doubt the validity of article 258 of the same constitution so far as any retroactive effect is claimed for it, and we deny that said article is, or pretends to be, an exercise of the police power. And we deny the efficiency of any of the ordinances of the city of New Orleans, as shown in this case, to in anywise deprive complainant of the rights given by its contract or charter, or to convey any of said rights or privileges to the defendant.

In all the cases cited from the supreme court of the United States (*Slaughter House Cases*, 16 Wall., 36; *Beer Co. v. Massachusetts*, 97 U. S., 25; *Fertilizing Co. v. Hyde Park*, id., 659; *Stone v. Mississippi*, 101 U. S., 814), bearing on the exercise of police power, there is no decision, no argument even, justifying the impairment of the obligations of a contract by the aid of the police power, in order to transfer property rights or privileges from one individual to another or from one corporation to another.

In the case of *Beer Co. v. Massachusetts*, *supra*, a prohibitory law against the sale of malt liquors was maintained, notwithstanding complainant's charter.

In the case of *Fertilizing Co. v. Hyde Park*, *supra*, a nuisance was allowed to be suppressed by village ordinance, notwithstanding a charter from the state to carry on a fertilizing business at that very place.

In *Stone v. Mississippi*, *supra*, a penal law prohibiting lotteries was upheld, notwithstanding a charter from the state to carry on the lottery business.

In each of these cases the right of a state, by the exercise of the police power, to suppress a business otherwise legiti-

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mate was recognized, although such business existed under chartered rights previously acquired.

But the proposition of defendant goes much further, and it is, that under the police power, by virtue of articles 248 and 258 of the state constitution, the contract privileges given by act No. 118 of the year 1869 to the complainant are not repealed or suppressed or policed, but distributed, and that therefore the defendant may lawfully take up the rights so by the police power taken from complainant. And it is to be particularly borne in mind, that neither the place nor the manner, nor the charges, nor the inspection, nor the business of complainant, are in any way obnoxious. There is no nuisance, no vice, no illegality tainting the conduct of complainant's business, and consequently there is no question of public health, manners or morals involved.

Under these circumstances, and with this view of the case, we incline to the opinion that defendant's pretensions cannot be sheltered under a claimed exercise of the police power, and that if articles 248 and 258 of the constitution of Louisiana, and the city ordinances thereunder, are to have the effect claimed by the defendant, then it would amount to an impairment of the obligations of complainant's contract with the state, and come within the inhibition of sec. 10, art. I, of the constitution of the United States.

Inclining to these views, and considering the state of the litigation between the parties, we think an injunction *pendente lite* should issue, to the end that the questions involved may be more fully argued and investigated, and the respective rights of the parties fully protected. A bond to cover damages, if any result, should be given.

It is therefore ordered that an injunction pending the suit issue as prayed for, on complainant giving bond in a penalty to be fixed, conditioned according to law.

BILLINGS, District Judge. I concur in the conclusion reached by the circuit judge. The case finds that in

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the year 1869 the complainant received from the legislature of Louisiana a grant of a corporate franchise, which was exclusive, to slaughter animals at a place designated in the charter for a period of twenty-five years; that the constitution of 1879 (arts. 248 and 258) attempted to abolish the monopoly features or the exclusiveness of all corporations except those contained in the charters of railroads; that the same constitution withdrew from the legislature the power to regulate the slaughtering of animals in cities and parishes, and conferred it upon the municipal and parochial authorities in conjunction with the local boards of health; that neither the legislature nor the proper municipal authority has ever declared that either the place or manner of conducting complainant's business was opposed to the public good, but that on the contrary, the municipal and health officers have designated the *locus in quo* of the complainant's business as within a district where said business may be carried on, and have prescribed regulations for the conduct of the business of slaughtering animals, none of which are being violated by complainant.

The case does not fall within the principle that legislative grants of a certain nature may be constitutionally recalled, even where that principle has been pushed to the extreme limit. That principle is, that legislatures are clothed by the people with limited power to bind their successors in any matter of public policy, and therefore the courts have held that such a grant could not stand in the way of the subsequent action of the police power. The extremest principle, when applied to this case, would lead to the conclusion that, if the proper municipal and health boards, in the exercise of the police power delegated to them, declared that complainant's business, either in its location or its methods, was injurious to the public health, they could regulate, or, if in their judgment the public health required, abolish it; that the grant is voidable and not void; that it is valid until the power, be it in the legislature or the municipal officers, in which is vested the function to deal with sanitary matters,

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finds it to be injurious. The conclusion is, that when, as here, the proper authorities find the place and manner of conducting the complainant's business to be harmless, there exists no power, either in the legislature or the people of the state, to abate it. So, according to the cases which have gone the farthest, so long as the place and manner of the complainant's slaughtering animals are sanctioned by that organ of the government of the state in which is vested the police power with reference to that subject matter, the action of the legislature in making the grant stands for that of the people of the state, and the exclusiveness of the right granted is protected by art. I, sec. 10, of the constitution of the United States. *The Bridge Proprietors v. The Hoboken Co.*, 1 Wall., 116.

KIRK V. LEWIS AND OTHERS.

A seizure, confiscation and condemnation of real estate, under the act of August 6, 1861, entitled "An act to confiscate the property used for insurrectionary purposes" (12 Stat., 319; Rev. Stat., sec. 5308), divested the title of the owner to the fee simple.

IN EQUITY. Heard on demurrer to the bill

The bill, which was filed by complainant in behalf of herself and as tutrix of her minor children, alleged that her husband was in his life-time seized in fee simple of certain real estate, which was particularly described; that said property was seized, condemned and sold under the act of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes" (12 Stat., 319; Rev. Stat., sec. 5308); that such proceedings divested only the life estate of her husband, and that since such condemnation and sale he had died, and the fee simple had descended to herself and her said wards, but that the purchasers, the defendants, still retained the possession of the property.

The bill prayed that complainant might be put in possession of the premises, and that defendants might be re-

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quired to account for the rents and profits which had accrued since the death of complainant's husband.

Messrs. W. R. Mills and R. Stuart Dennee, for complainants.

Messrs. John A. Campbell and Thos. L. Bayne, for defendants.

BILLINGS, District Judge. There have been several grounds urged in support of the demurrer. I shall consider but one: Did the respondents purchase the fee of the property or only a life estate? The bill and record of this confiscation proceeding, which are made part thereof, show a sale by the United States marshal, and a purchase by the defendants of the property here demanded, under the act of August 6, 1861. That act provided for the seizure and confiscation of property used or intended to be used to aid in a rebellion then a war. It made no discrimination between the property of citizens and that of aliens. It excited no scruples as to its constitutionality in the mind of the president. It was qualified and restricted by no joint resolution; in fact, it added nothing to the undoubted right of war which the government before that possessed, to seize and dispose of all property used in aid of its enemies. The sole effect was to declare the purpose of congress to enforce a belligerent right. The supreme court says this emphatically in *Miller v. U. S.*, 11 Wall., 308, and they reaffirm the same doctrine in *Osborn v. United States*, 91 U. S., 474. All the cases in which the supreme court have limited the estate which passed at a confiscation sale to a life estate, have been prosecuted under the act of July 17, 1862. In all these cases the restriction has been put on the estate in consequence of the joint resolution. See *Bigelow v. Forrest*, 9 Wall., 339, and *Day v. Micou*, 18 Wall., 156. But the joint resolution was in its terms confined to the act of 1862. The effect of this confiscation, which in its terms included the fee, is to be determined by the character of the act of 1861. This, the supreme court say, was an exercise of the war power, and

not of municipal sovereignty. This is consistent with the rulings of the supreme court in the *Armstrong's Foundry*, 6 Wall., 766. That case holds that a pardon, properly pleaded, ended proceedings under the act of 1861. That case does not decide the question presented here. The power given by the constitution to the president to pardon is without qualification, and a complete pardon remits all forfeitures except where the rights of third persons have intervened. This is equally true where the forfeiture arises under a merely municipal law or the law of nations, and does not conflict with the doctrine, as above established, that a forfeiture arising *jure belli* is to be measured by the grant of power to congress to declare war and make peace; or with the other doctrine, that the act of congress under which this forfeiture was made was the exercise of a belligerent right on the part of the government of the United States.

Let the demurrer be sustained.

GAUCHE AND ANOTHER, SYNDICS, v. LONDON & LANCASHIRE
INSURANCE COMPANY.

1. The stipulations in a policy of fire insurance requiring that proof of loss should be made, and that sixty days should elapse after such proof before the loss was payable, and that, in case of difference between the parties in respect to the amount of loss, that matter should be referred to arbitrators, and that no suit should be brought on the policy until their award was made, are conditions precedent to a suit on the policy.
2. When by the terms of the policy the insurers were allowed sixty days after proof of loss within which they might reinstate the insured, the account and proof of loss furnished should, as far as practicable, give a detailed itemized statement of the loss.
3. The fact that the insurers have had in their possession since the loss the books of the insured, containing the invoices of the goods insured, or the fact that the insured have, at the instance of the insurers, been examined under oath in respect to the loss, will not relieve them from their obligation to furnish proof of loss.

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4. When there is no evidence of the waiver of the proof of loss, or of the destruction of the books of the insured, or other means necessary to make it out, the question of the sufficiency of the proof of the loss is one of law.
5. When an insurance company objected to several proofs of loss successively presented by the insured, and insisted that the stipulations of the policy in respect thereto should be exactly complied with, it could not be held to have waived the proofs, even though those presented were made out as required by the policy.
6. When a contract provides that suit shall not be brought on it till the expiration of a specified time, the issue of the writ is the commencement of the suit.
7. Parties may legally, by their own agreement, refer the amount of damage under their contract to arbitrators, and by a proper covenant withdraw that question from the courts.

Action at law upon a fire insurance policy.

Messrs. Joseph P. Hornor, Francis W. Baker, George H. Braughn, Charles F. Buck, Max Dinkelspiel, L. L. Levy and Benjamin C. Elliott, for plaintiffs.

Messrs. John A. Campbell, Edward W. Huntington, Francis T. Nicholls, Charles Carroll and Charles E. Schmidt, for defendants.

BILLINGS, District Judge. This is an action upon a policy of insurance against loss by fire. The defendant pleaded special pleas, or, as under our Code of Practice they would be termed, dilatory exceptions, along with the plea to the merits. These pleas are to the effect that the conditions precedent established by the policy have not been performed: (1) In that no proper preliminary proofs were furnished; and (2) that there had been no arbitration whereby the "amount of loss" must be determined, and that until these conditions have been performed no right of action in the plaintiff exists. The court ruled that the plaintiffs, having alleged performance by furnishing preliminary proofs, were confined to evidence in support of that allegation, unless they elected to amend and plead a waiver of that obligation; and the plaintiffs elected to stand upon the allegation that preliminary proofs were furnished. Under rule 3 of this

court these special or dilatory pleas were first tried, and when the evidence on the part of the plaintiffs was finished, defendants' counsel asked the court to exclude the testimony from the consideration of the jury as being insufficient to show the delivery of preliminary proofs or any arbitration and award. The policy of insurance offered in evidence by the plaintiffs contains certain provisions which are declared therein to be conditions with reference to the preliminary proofs, and with reference to arbitration. These provisions are held to be conditions precedent by an unbroken line of authorities. Unless they are against the policy of the law, or have been waived, they must be proved to have been performed as stipulated, for they are the law of the case established by the parties themselves.

1. First, as to the preliminary proofs. The stipulations on this subject are as follows:

No. 8: "All persons insured by this company, sustaining any loss or damage by fire, shall immediately give notice to the company or their agents, and within fourteen days after such loss or damage has occurred shall deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or their agents may reasonably require; and until such declaration or affirmation, account and evidence be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable."

And:

No. 10. "Payment of any loss or damage shall be made within sixty days after satisfactory proof thereof shall have been made to the company, in accordance with the conditions of this policy, and in every case of loss the company will reserve to itself the right of reinstatement, in preference to the payment of claims, if it shall judge the former course to be most expedient."

These provisions are cumulative, and are to be construed

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together. Their meaning is that the assured's right of action shall not be exercised until there has taken place both the delivery of satisfactory proofs and the passage of sixty days thereafter. The assured, therefore, can in no case maintain an action until sixty days after he has rendered preliminary proofs, which either are to be deemed satisfactory because they are accepted by the insurers, or are satisfactory, whether accepted or rejected by the insurers, because they perform the promise contained in the contract.

The fire and loss occurred on January 1st. Four papers, or sets of papers, were furnished to the defendants on behalf of the insured, as preliminary proofs, as follows: The first within a week after the fire; the second on January 24th; the third on February 11th; and the fourth on February 28th.

In response to the first proffer an oral statement was made that it was unsatisfactory. To the second a reply was given in writing that the papers were insufficient, and they added: "We notify you for your guidance that only such papers as comply in every respect with section No. 10 of the printed conditions of our policy can be accepted by us as proper proofs of said loss." To the third set of papers a written reply was given, returning them and repeating the substance of the second reply, but more fully expressed. To the fourth the written reply was given as follows: "We return the inclosed papers, purporting to be proofs of loss, which are incomplete and unsatisfactory."

It was proved that the insured were, during the time occupied by their successive offers of proofs, examined under oath at the instance of the defendants; that the following paper was executed by the insured on the one part, and by those who represented the defendants and the other insurers on the other part:

"STATE OF LOUISIANA, *Parish of Orleans*: This agreement, made on the 13th day of January, 1881, between Messrs. Isidore Levy & Co., of the first part, and the several insurance companies interested in their loss by fire January 1,

1881, of the second part, mutually agree that the merchandise saved from the front store, No. 24 Magazine street, has the present value of \$1,000; the condition of the stock being in such a condition that it is impossible to determine the first cost of the same.

(Signed)

"ISIDORE LEVY & Co.,

"By Isidore Levy.

"J. W. COVINGTON,

"C. N. WELCHANS,

"Committee for insurance company at interest."

And that the damaged goods were subsequently taken by the insured. The examination of the insured was entirely consistent with the demand for proper preliminary proofs. See *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25. The court there say:

"Did the examination of the title, and the proceedings of the board respecting it, presuppose an examination of the preliminary proofs and an acquiescence in its sufficiency? We think not. The proof of interest, and the certificate which was to precede payment if the claim should be admitted, are distinct parts of the case to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered without violating propriety or convenience. The consideration of the one does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question, and adds that until such affidavit and certificate are produced, the loss claimed shall not be payable. The affidavit and certificate must precede the payment, but need not precede the consideration of the claim."

The agreement that the value of the damaged and saved goods should be fixed at \$1,000 had no tendency — no direction — towards waiver. In fact, it rendered a full enumeration of the lost articles all the more necessary, as, in case the

defendants had elected to reinstate, the plaintiffs would have been debtors to them in that sum.

It was also urged by counsel for plaintiffs that so complete had been the proofs that the general objection of the defendants worked a waiver as being utterly groundless. I cannot assent to that reasoning. If one party to a contract insists it has not been performed, even if he be perverse and altogether unsupported by reason or law, the answer to his demand for performance could never be that by unreasonable exaction he had waived any right, but he could be answered only by showing complete performance of the contract. It is not contended that there was any express waiver, nor has there been any evidence introduced tending to show an implied waiver. The doctrine upon which waivers of this clause have been implied is that of good faith; that neither by silence, nor by putting the refusal to pay upon grounds which seemingly admit or dispense with preliminary proofs, shall the insurer mislead the assured into a belief that his proofs are proper, and afterwards be allowed to absolve himself from liability by showing defects in those proofs. This doctrine is not only the doctrine of the law; it is that of morals and of integrity. But it has no application to a case where, as here, from first to last, the insurer gave notice to the assured that with respect to proofs the terms of the stipulation must be exactly complied with. It can never be held that denial, even if it were excessive, amounts to affirmation. There is no evidence on this subject except that of constant, uniform, unwavering demand on the part of the defendants of an unrelaxed performance of this part of the contract. The law on this point is laid down with explicitness in *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw., 495. The court there say:

“Silence when they (preliminary proofs) are furnished, especially if accompanied with the plain assertion of a distinct ground of defense, or a general denial of their liability, will ordinarily amount to a waiver. And we see that the reason of this is the tendency to mislead the claimants. But

I have not found a case—I doubt if any is to be found—holding that the assurer who apprises the assured that his papers are no proofs, and refers him to the policy, is bound to go farther and specify the particular defects. No case has decided that if he apprises the insured that he will rely on the defect of proofs he waives this objection by taking others which he insists will defeat the recovery.”

In *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. St., 324, the court say:

“They (the insured) were given to understand that a particular statement was necessary. How it can be claimed they were released from the obligation to furnish it, we cannot discover.”

The question then is, did the plaintiffs furnish the proofs called for by the terms of the policy?

The fourth set of documents could not be a basis for this suit. They were furnished not earlier than February 28th. This suit was instituted on April 25th. Sixty days must elapse, and there had elapsed only fifty-six. It is urged that though the petition was filed on April 25th, citation was not served till the 30th of that month. So far as interruption of prescription is concerned, the time dates from service of petition, because it is in that case treated by the statute as a question of time of notice to the defendant. But when, as here, the court is called upon to enforce an agreement of the parties that suit shall not be brought, the commencement of the suit is the issuance of the writ (here the citation), and the pleas and judgment have relation to that time alone. See Bouv. Law Dict., *verbis* “Commencement of Suit,” and the authorities there cited.

The fourth set of papers, therefore, need not be considered. The question here is, then: Were either of the first three papers or sets of papers, or all together, sufficient preliminary proof of loss within the meaning of the terms of the stipulations of this policy? The insurance is “on stock consisting of china, glass, wood and willow ware, and general house-furnishing goods.” The statement is to be as particular an

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account of their loss or damage as the nature of the case will admit of, and the company in every case reserves the right of the reinstatement, *i. e.*, of the substitution, of new articles in place of those destroyed.

The first paper, that of January 24th, is without affidavit or even signature, and consists of a reference to the books of the assured under the items of stock as per inventory, various "invoices, sundries, cash, and suspense," with an added total of \$95,928, from which are deducted total sales, profits, amount duties paid, the amount of ten invoices and traveling expense charged to merchandise, making in all the sum of deductions to be \$39,778.19, leaving a balance of \$56,149.82.

The second and third papers add nothing to the statement by way of particularity. The addition being an affidavit, a statement that all the books of the insured were in possession of defendants for two weeks after the fire, and the statement that some \$4,600 worth of goods were in other warehouses and insured by the La Confiance Insurance Company; and concludes, the statement B, "annexed to our proof of loss (the first paper as above designated), contains a complete list of our stocks taken from our books, and is true and correct." And the second paper, that of the 24th of January, says the "insured claim as follows: On stock consisting of china, glass, wood and willow ware, and general house-furnishing goods, contained in three-story brick slated building aforesaid."

The question, then, is not whether the insured are exempted by destruction of sources of information from compliance with the stipulation to furnish a particular statement, but whether this is in itself a particular statement of the loss or damage to a company who are by the terms of the policy to have sixty days to reinstate, and by insured parties who have offered no evidence tending to show that they did not have unimpaired all of the appliances of wholesale dealers — such as books, invoices and letters — from which to make a proper statement. It is to be observed that the statement

never approaches detail, does not deal in a single particular as to kind or enumeration, and if it gives even the slightest notion of value, does it only by reference to the books and invoices in their own possession. The question is directed in this case to this statement free from all extrinsic matters, and the court is called upon to say whether this is a particular statement. I feel bound to say that it is in no sense a particular statement. It has not one element of such a statement. A particular statement should give accurately, if possible, or, if not possible, approximately, the *kind* and *value* of the articles lost. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434.

It should also be at least an effort to enumerate. It should be in its aim of such a circumstantial character as to afford detailed, itemized information of the extent of the loss. All this is wanting. It gives the stock on hand in May, adds the invoices in gross, deducts the sales and profits, and presents the result in bulk, so to speak, as the sole means of arriving at the loss. It gives no weight, no measurement, no reckoning, no description, however general. This is no particular account. It is rather an estimate without particulars. Instead of enabling verification it would defy it. Instead of furnishing opportunity to substitute, it gives not even the most vague description. Precisely this manner of statement was condemned as being not a particular account, first by the common pleas court by the court, and, on appeal, by the supreme court, in *Lycoming Ins. Co. v. Updegraff*, 40 Pa. St., 311. The court there said (p. 323): "We agree with the learned judge of the common pleas, that the paper which was furnished was not such a particular account of the loss as was required by the policy." The case is not varied by the fact that the insurers had had possession of the books containing the inventory and invoices to which reference was made. It was, nevertheless, the duty of the assured to carry on the process of searching for and finding the elements of a particular account in their own books, and they could not thus cast it upon the insurers. I do not mean to say that

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accounts no more particular than this have not been accepted by courts as sufficient, but it has been where the acts of the underwriters constituted a waiver, or where the fire which occasioned the loss also destroyed all means of identifying and describing the things destroyed. But where, as here, there is an absence of all evidence of estoppel on the part of the defendants, and of inability on the part of the insured, I know of no case which holds such a statement as was presented in this case to be a compliance with the stipulation to furnish a "particular account."

2. Is the question here presented one for the court or the jury? The answer depends upon whether the question be one of law or fact. If there had been evidence tending to show waiver of preliminary proofs, that would have been for the jury. If there had been evidence tending to show destruction of books, so that there could be no compliance with the stipulation requiring proofs, that would have been for the jury. In all the cases where courts have held that the sufficiency of preliminary proofs must go to the jury, there has been either the question of defective ones having been rendered sufficient ones because of waiver, or because of destruction of books or other inability to furnish proper proofs from some cause beyond the control of the assured. In those cases the question reaches out to matters extrinsic to the papers themselves, claimed as constituting proofs, and the question of sufficiency is for the jury. But this case finds neither evidence tending to establish waiver, nor destruction of books, nor other cause of inability. It presents simply the question whether, intrinsically judged, in and of themselves, the papers submitted constituted proofs. The decisions of the supreme court of the United States and of the supreme courts of the states have with well nigh unanimity defined with exactitude the principle which separates questions of law from questions of fact. The question which presents the closest analogy to the one before the court is, what constitutes due diligence in giving notice to an indorser of a promissory note of non-payment? and a long line of concurrent decisions has established the law as being that,

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when the facts are undisputed, what is due diligence is a question for the court. In the cases collated — 1 Brightly's Dig., *verbo*, "Jury 7," (a) No. 102, p. 511 — it is also held that when the facts are admitted or established, the question as to what is a reasonable time for the production of preliminary proofs is for the court. *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507.

In the cases where, as here, nothing was before the court except the measurement of the papers proffered as preliminary proofs by the requirements of the contract — no extrinsic question — the court has uniformly determined as to the sufficiency of proofs. Justice Story did this in *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434; *Beatty v. Lycoming County Ins. Co.*, 66 Pa. St., 9; *Wellcome v. People's Equitable Fire Ins. Co.*, 2 Gray, 480; *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow., 645, and *Kimball v. Hamilton Fire Ins.*, 8 Bosw., 495. As to the question whether the sixty days had elapsed since the service of the last set of papers, and before the institution of this suit, see ruling of Judge Duer in *Norton v. Rensselaer & S. Ins. Co.*, *ubi supra*. From an examination of the cases cited, and of all the cases I could consult, I am of the opinion that the question here presented is for the court to respond to, and the court declares that there had not been preliminary proofs furnished according to the conditions of the policy sued on sixty days prior to the commencement of this suit.

3. The third special plea of the defendant is to the effect that it was a part of the contract of insurance, made a condition precedent to the right to maintain an action thereon, that in case of difference between the parties there should be an arbitration and award as to amount of loss or damage; that there was a difference; that there has been no arbitration or award; and avers willingness at all times on the part of defendants to submit the amount of loss or damage to arbitration.

The stipulations as to award are as follows:

(11) "If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud

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suspected, such difference shall be submitted to arbitrators indifferently chosen, whose award, or that of the umpire, shall be conclusive."

And:

(14) "It is further hereby expressed, provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided."

It has been urged that this stipulation is void as being against the policy of the law, in that it withdraws the questions from the courts. I think the weight of authority is decidedly in favor of the conclusion that parties may legally by their own agreement refer the amount of damage under a contract to arbitrators, and by a proper covenant withdraw that one question from the courts. In *Scott v. Avery*, 5 H. of L. Cas., 811, this was decided in 1856, and that decision has been, so far as I can ascertain, acquiesced in both in Great Britain and in this country. The cases which seem to conflict with this case are those which were, or were thought to be, distinguishable from it. The doctrine there established has not been doubted. The cases to which I have been referred which were construed to be opposed to it are where there was no covenant not to sue until an award, but merely a covenant to refer. Those cases are in harmony with *Scott v. Avery*, as appears by the lucid statement of Baron Bramwell in *Elliot v. Royal Exchange Assurance Co.*, L. R., 2 Exch., 245, and adopted by Lord Coleridge in *Dawson v. Fitzgerald*, 1 Law Rep., Ex. Div., 260. That statement is as follows:

"If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall

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settle the amount, then no cause of action arises until the third person has so assessed the sum."

The cases where an action will not lie, and the case where an action will lie, are here precisely distinguished. It is the negative words contained in the fourteenth stipulation, that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable until after an award, which place this case in the latter class of cases. That this plea is, in law, good, is well settled by authority. Under our system of pleading we have no written statement responsive to the pleas of defendants, except where they amount to a reconventional demand. But the plaintiffs may give in evidence any matter in disproof or avoidance of the pleas, as if the practice of the courts allowed a responsive pleading and he had pleaded the same. The production of the policy by the plaintiffs maintains the substance of this plea, *i. e.*, the covenant not to sue; the stipulation is contained therein as is averred. That being so, there could be but two facts which could have avoided this plea, either that it had been waived by defendants, or that insured had offered to perform, *i. e.*, had offered to arbitrate, and a refusal on the part of defendants. The plaintiffs have introduced no evidence tending to establish any fact in avoidance of the condition or covenant which the contract they sue upon contains.

The court having announced its conclusion that there was no evidence to be submitted to the jury, the plaintiffs submitted to a nonsuit, which was accordingly entered.

OGLESBY AND OLKEN V. ATTRILL.

Upon a bill to impeach a judgment at law and for a new trial, a substituted service of subpoena was ordered. *Held*, (1) That the case was one in which substituted service was proper, and the court would proceed without actual service of subpoena on defendant. (2) That an amendment to the bill by which complainants sought to charge the defendant as trustee made a new case, in which the defendant was not properly before the court, and the amendment should be stricken from the files.

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Motion to take amended bill from the files.

Messrs. Richard De Gray, Robert Mott and Henry B. Kelly, for complainants.

Mr. Thomas J. Semmes, for defendant.

PARDEE, Circuit Judge. The original bill, in its widest scope, is a bill to impeach a judgment rendered at law, and to procure a new trial in the case where the judgment was rendered. It was only for such a bill that substituted service was ordered by the court. It is only for such a bill that the defendant is before the court.

Under leave obtained from the court complainants have amended their bill by setting up matters not pertinent to the question of a new trial or to the impeachment of the judgment rendered, but tending to charge the defendant, as trustee for the complainants, for a large amount of gas stock, the sale of which constituted the cause of action in the case at law wherein the new trial is sought.

Counsel for defendant moves to take the amendment from the files on the grounds (1) of the limited appearance of the defendant, and the limited jurisdiction of the court over the defendant; (2) because the amendment makes a new case. The motion is a proper one (see 1 Daniell Ch., 426), and I think the last ground well taken. The first clause of amendment made can have no effect unless it be to charge the defendant as trustee, and to give it that effect would be to make a new case. Besides, an inspection of the record shows that it makes a case inconsistent with the position of complainants in the suit at law, where they are seeking a new trial. In that case they sued for damages growing out of the alleged fraudulent sale of the gas stock, which to that extent was an affirmance of the sale. *Miller v. Barber*, 66 N. Y., 558. See *Stevenson v. Newnham*, 76 E. C. L., 285.

Solicitor for defendant also moves the court that the substituted service of process heretofore made in this case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated

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by the district judge sitting in this court in the early stage of this case. 12 Fed. Rep., 227. This decision is not open for review to any other judge sitting in this court in the same case. See *Cole Silver Min. Co. v. Virginia, etc., Co.*, 1 Sawy., 685. Besides, the decision seems to be well supported by the language of the supreme court in the case of *Minnesota Company v. St. Paul Company*, 2 Wall., 609, where it is said:

"Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were party to the judgment at law."

If this be the practice where a bill is brought to enjoin a judgment, what doubt can there be as to the propriety of substituted service when a bill is brought to obtain a new trial of a cause at law in the same court?

It seems to me that the motion of defendant to take the amendment from the files should be allowed so far as the first clause of complainants' amendment of date January 2, 1882, is concerned, and that otherwise the amendment may stand; the defendant to plead, answer or demur on or before the rule-day in March; the complainants to pay the costs of this rule. And it is so ordered.

DUNBAR AND OTHERS V. WHITE AND OTHERS.

The specification of an original patent pointed out a certain material to be used, and declared that its sole utility and availability consisted in two of its properties. The reissued patent substituted other materials, naming those only which possessed the same two properties. *Held*, that there was no expansion of the patent, and that the reissue was valid.

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IN EQUITY.

Messrs. A. H. Leonard and J. W. Gurley, for complainants.

Messrs. Joseph P. Horner and F. W. Baker, for defendants.

BILLINGS, District Judge. The case has been heard, and is submitted for a final decree upon the pleadings and evidence. The bill is to protect the rights of a patentee, and is for an injunction and account. Upon the hearing for a preliminary injunction, I directed that defendants should be required to keep an account of all their transactions which should be had, which could be included within the rights granted to complainants. This decree in effect maintained the validity of the complainants' claim.

The sole question in the case is this: In a case where the plaintiff's right to recover against the defendant would have been perfect under an original patent, can a surrender and a reissue invalidate that right? Complainants' original patent was granted June 20, 1876. Defendants' patent was issued April 6, 1880. Complainants' reissued patent bears date December 6, 1881. The legal propositions which affect this case were, as it seemed to me at the prior hearing, and as it seems to me after the present hearing, the following:

1. A reissued patent which enlarges an original patent, *i. e.*, which makes the invention patented other and more inclusive than the original letters patent, is void as against intervening rights and the public as well.

2. Where a patentee in his original claim and specifications describes his invention in part by specifying a material to be used, but declares that the sole utility or availability of that material in connection with his device is that it has two properties; and in his reissued patent, in his claim and specifications, in the description of his invention, substitutes for his former specification of a material to be used as a part of his device, a description of materials which may be used by specifying only those which have the two properties in

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which he had formerly declared the utility or availability of the material which he then named consisted, there is no enlargement of the thing patented, and the reissued patent is, therefore, valid.

3. Where, as in this case, the original claim and specifications were for a textile fabric as an envelope for the shrimp, in connection with other things, and it was declared that the sole object of its use was to prevent contact (that is, to secure separation) without discoloration; and in the reissued patent, in the claim and specifications, it is declared that any enveloping material may be used which will separate and not discolor,—the change is only that of substituting the description of a thing by naming it, with the addition of its essential quality,—the description of the thing by naming its qualities.

4. The object of the law on the subject of patents is to advance the interests of the public by securing certain exclusive rights to patentees, and among these rights is that of changing, by a surrender and reissue, the language, where the idea remains the same.

5. Let there be an account taken before the master of the sales of the defendants in violation of complainants' patent, and a report thereon, and let the injunction be made perpetual during the continuance of complainants' patent.

MAURY & CO. V. CULLIFORD & CLARK.

1. If a contract is maritime in its nature and effect, it will be enforced by the admiralty courts of the United States, though it may not be considered a maritime contract in the courts of the country where it is made.
2. A maritime lien is not essential to give jurisdiction to courts of admiralty.
3. Neither a notice to a party to a maritime contract that he would be held in damages for its non-performance, nor a refusal to give orders for the lading of a ship after the time fixed by the contract for accepting her had passed, cancels the contract.

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ADMIRALTY APPEAL.

The facts are set forth in the opinion of the court.

Mr. Thomas J. Semmes, for libelants.

Mr. John A. Campbell, for defendants.

PARDEE, Circuit Judge. The record shows the following facts:

(1) That June 12, 1879, the parties entered into a contract of charter in the terms following, to wit:

"It is this day mutually agreed between Messrs. Culliford & Clark, owners of the good screw steamship called the *Romulus*, or boat of similar size, of one thousand four hundred and forty-two tons gross register, and nine hundred and twenty-two tons net register, say from four thousand to four thousand five hundred bales cotton, now whereof — — is master, of the one part, and Messrs. J. H. Maury & Co., of Mobile, merchants and charterers, of the other part, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, having liberty to take outward cargo for owners' benefit, but not West India or infected ports, proceed to the Southwest Pass or Key West, at captain's option, for orders, to be given immediately upon arrival, to load at Pensacola or Mobile, one port only, or so near thereunto as she may safely get, and there load from the said charterers or their agents a full and complete cargo of cotton, in square bales, to be compressed in Taylor or equally good presses, at ship's expense, as customary, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, furniture, engine-room, machinery and coals, and being so loaded, shall therewith proceed to Liverpool, or to a safe port on the continent between Havre and Hamburg, Holland and Dunkirk excepted, both inclusive, or to Revel, one port, as ordered in signing bills of lading, or so near thereunto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage. (Restraint of princes and rulers, the dangers of the seas, rivers, and navigation, fire, pirate, ene-

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mies, and accidents to machinery or boilers during the said voyage, always excepted.)

"Eighteen working days are to be allowed the said charterers (if the ship is not sooner dispatched) for loading; to count from the time the steamer is ready to receive cargo and written notice thereof by the master to the charterers or their agents; to be discharged as fast as the custom of port will permit. The cargo to be loaded and discharged according to the custom of the respective ports. Charterers to have option of ordering the steamer from port of call to an Atlantic port to load under this charter-party; all conditions remaining the same as within. In the event of the steamer being ordered to load at Mobile, charterers to pay half the lighterage incurred. Should the steamer be ordered to Havre, Mr. F. Dennis, or charterers' assignees, to transact the ship's inward business for one-half per cent.

"And the said charterers do hereby agree to load the said vessel with said cargo at her port of loading, and also to receive same at her port of delivery, as herein stated, and also shall and will pay freight as follows: At the rate of, if discharged at Liverpool, seven-sixteenths per pound gross weight, delivered; if discharged at any othersafe port on the continent, seven-sixteenths per pound gross weight, shipped; if discharged at Revel, one-half pence per pound gross weight, shipped; for cotton in square compressed bales, with five per cent. primage thereon. Payment whereof to become due and be made as follows: Cash for ordinary disbursements at port of loading, if required, not exceeding £——, to be advanced to the master by the charterers' agents, at the current rate of exchange, against the captain's draft, at issuance, on the consignee or agents, together with insurance, and a commission at two and one-half per cent., and the remainder, on the true delivery of the cargo, in cash without discount. Lay days not to commence before the 5th of October, and merchants to have the option of canceling this charter-party should steamer not arrive at Southwest Pass or Key West by the 20th of October. And also shall and will pay

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demurrage the sum of forty pounds British sterling per day, to be paid day by day for each and every day the steamship be detained over and above the said laying days and times as herein stated, but the vessel not to be required to remain on demurrage longer than ten days. The steamship to be consigned to the charterers, or their agents, at the port of loading, paying two and one-half per cent. commission. The master to sign bills of lading at current rates of freight, if required, without prejudice to this charter-party; but should the aggregate freight by bills of lading amount to less than the total chartered freight, the master to be paid the difference in cash before sailing.

“And for the true performance hereof each of the said parties doth hereby bind himself and themselves unto the other in the penal sum of estimated freight, — pounds of good and lawful money of Great Britain; it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owners shall have an absolute lien and charge on the said cargo.

“Five per cent. commission is due on the execution of this charter-party to Stoddard Bros., Liverpool, by whom the steamship is to be reported at the custom-house on her arrival at Liverpool, or by their agent at any other port of discharge.”

(2) That the said chartered ship *Romulus* did not *proceed with all convenient speed* with liberty to take outward cargo, etc., to the Southwest Pass, or Key West, at captain's option, for orders from said Maury & Co., but did proceed to New York, and from New York to Rouen, France, and from Rouen to Penarth, Wales, and from thence, October 29, 1879, to Southwest Pass, arriving there November 18, 1879, and then reporting to libellant for orders.

(3) That the defendants made from time to time various propositions to the libellant to furnish him a ship under the charter-party, as follows:

September 1, 1879, an offer was made to send the *Romulus*, then in New York, to arrive in September. This was de-

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clined as too soon. The same day an offer was made of the *Deronda*, then in Liverpool, to arrive in September. It does not appear whether the *Deronda* answered the charter or not. This offer was also declined, as the arrival would be too soon for libellant's engagements.

September 18, 1879, an offer was made of the *Douro*, to arrive at the end of October, which was declined as not complying with charter.

(4) That the defendants, Culliford & Clark, except as above set forth, made default and did not furnish the ship *Romulus*, or a boat of similar size, to the said Maury & Co., as by the aforesaid contract they had bound themselves to do.

(5) That by the failure of said Culliford & Clark to comply with the terms of their said contract, the said Maury & Co. were compelled to pay, and did pay, higher rates of freight on the cargo contracted to be shipped on said *Romulus*, or boat of similar size, to wit, on four thousand five hundred bales of cotton, and suffered other damages as set forth on the libel filed in this case.

The first objection argued to the court is that the said charter-party is a mere preliminary or preparatory contract, having reference to services of a maritime nature to be rendered; and the case of *The Schooner Tribune*, 3 Sumn., 144, is quoted. An examination of this case shows that while Judge Story admitted the proposition that the admiralty has no jurisdiction over preliminary contracts leading to maritime contracts, he held that the jurisdiction of the admiralty does not depend upon the name of the instrument, whether it imports to be a maritime contract or not. He further held that an agreement for a charter-party to be made at a later period might amount to a present charter-party, notwithstanding a more formal instrument was contemplated.

In the charter-party recited in this case there is a complete contract for maritime services to be rendered; and no other instrument was contemplated at a later period, nor of a more formal character.

The next objection is that the court is without jurisdic-

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tion upon a contract of affreightment until there is a ship, a voyage, and an engagement for services, and cargo offered and accepted; and that an admiralty court has no cognizance of damages for breaches of unexecuted charter-parties. That where there is no freight offered and accepted there is no lien, is well settled. See leading case, *Vandewater v. Mills*, 19 How., 82.

The real question to be determined is, is a maritime lien essential to give the courts of the United States admiralty jurisdiction?

In *Ex parte Easton*, 95 U. S., 68, Mr. Justice Clifford quotes from 2 Story, Const., § 1666, approvingly, as follows:

"Admiralty jurisdiction embraces all contracts, claims and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation."

And then Justice Clifford says:

"Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation."

In this case it was held that there was a maritime lien for wharfage. The syllabus in *Insurance Co. v. Dunham*, 11 Wall., 1, giving the point of the decision, is:

"As to contracts, the true criterion whether they are within the admiralty and maritime jurisdiction is their nature and subject matter, as whether they are maritime contracts having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made."

And Justice Bradley, organ of the court, in the same case, says, after reviewing all the authorities:

"It thus appears that in each case the decision of the court, and the reasoning on which it was founded, have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended not

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on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court."

In this case it was decided that a contract of marine insurance was a maritime contract, and there was no contention for a maritime lien.

A number of cases from the various circuit courts of the country, bearing on this question, have been cited, and a large number can be found, which cases leave the question open — still unsettled. English authorities cited do not bear on the case, because of the different jurisdiction of English admiralty courts, particularly since the admiralty act of 24 Vict., c. 10. See Parsons, Shipp., 842.

It is easily seen that there is no good reason for drawing the distinction sought to be made. The contract, which is the basis to this action, is indisputably a maritime contract. It relates wholly to ships, cargoes, freights, etc., on navigable waters. If it had been half complied with, not an objection could have been suggested as to our jurisdiction. If the defendants had broken their contract to the extent of one bale of cotton only, we could have amerced them. Are they to escape scot-free by the magnitude of their breach?

In the case of *Watts v. Cumors*, lately decided in this court, the owners, for a total breach of a charter-party, filed a libel *in personam* against the charterers, and although the court held the charterers liable, no suggestion of want of jurisdiction was made; and I understand these libels have generally been allowed in this circuit.

The third objection argued is that the contract was executed in Great Britain and is to be construed according to the law of the place of contract, and that under the laws of Great Britain it was not a maritime contract, and the court of admiralty would not have jurisdiction either *in rem* or *in personam*; and cited *The Dannebrog*, 4 L. R., Ad. & Ecc., 386.

The restricted jurisdiction of the English admiralty courts

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has been frequently noticed by our courts, and see act, 24 Vict., called the "Admiralty Court Act."

Justice Bradley says, in *Insurance Co. v. Dunham, supra*, that the place where a maritime contract is made does not affect its character, and that our admiralty jurisdiction depends on the nature and effect of the contract.

The other objections are based on the proposition that Maury & Co. had canceled the contract by their notification to the defendants that they would hold them in damages for non-compliance, and by their refusal to give orders to the *Romulus* after the time for fulfilling the contract had expired. It can hardly be claimed that the persistent demands of Maury for the execution of the contract or damages for non-execution should be construed as a cancellation of the same, and yet that is all this proposition seems to amount to.

The whole fact is that defendants contracted to furnish the libelant a ship of certain character between the 5th and 20th of October, 1879. They did not do it, and have no excuse therefor but inconvenience to themselves, and the refusal of libelant to take an earlier or later ship, or a ship not complying with the contract. And in the record is an attempt to prove a custom in England that the clause in the charter-party giving libelant authority to cancel the contract in case no ship arrived by the 20th of October, really means that libelant waived all damages if the ship did not arrive according to the charter, reserving to himself, if the ship ever did arrive, the privilege of accepting her or not. In other words, the owners had the option of sending the ship or not. If sent in time, the charterer must accept her; if not in time, the charterer might use his option to accept or reject her. And this, the witnesses swear, is necessary to secure mutuality of contract. But the learned proctor for respondents has not argued this defense, either orally or in his brief, and I doubt if he relies on it. In *McAndrew v. Adams*, 27 Eng. C. L., 297, under similar clauses in a charter-party, no such custom was urged or considered.

I finally conclude that under all the circumstances of this

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case, and the authorities presented, I will maintain jurisdiction, and hold the defendants for all damages claimed in the libel and resulting from the failure of defendants to execute their contract. A reference and further proof will be necessary to ascertain such damages. It follows that the cross-libel filed by the defendants for damages growing out of the attachment issued in this case must fall. A decree in accordance herewith will be entered by the clerk, and on the final decree the facts and the conclusions of law will be found as set forth herein.

MYERSON V. ALTER.

In Louisiana a suit to recover damages for the malicious prosecution of a married woman must be brought in the name of the husband, even though the husband and wife were married and are domiciled in another state.

Heard upon exception to the petition.

Messrs. Henry J. Leovy and E. B. Kruttschmidt, for plaintiff.

Mr. A. G. Brice, for defendant.

BILLINGS, District Judge. This is a suit brought by a wife to recover damages for a malicious prosecution. Her husband has subsequently authorized her bringing the suit, but comes "solely to assist her in prosecuting this suit, and as husband does not claim any share in said damages, but joins her to claim the same in her behalf." The exception interposed by the defendant is that this action must be brought by the husband. It is evident that if the exception be well taken it has not been cured by the paper filed by the husband. So far as the right in law on the part of his wife to maintain the suit, he leaves the matter where he finds it. He does not even do anything which would make him liable for costs. He simply assents that she carry on the suit herself in her own behalf.

The textual provisions of the law on this subject are found

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in the Code of Practice, art. 107, and Civil Code, art. 2404. A series of decisions by the supreme court of Louisiana have construed these provisions to mean that where it does not appear that the wife is administering her own property, actions of this sort must be brought by the husband. The mere joinder of the wife has been treated as surplusage. But no case has held that the mere assent of the husband is sufficient. The action must be brought by the husband. *Holmes v. Holmes*, 9 La., 348; *Cowand v. Pulley*, 9 La. An., 12; *Barton v. Kavanaugh*, 12 La. An., 332; *Cooper v. Cappel*, 29 La. An., 213. This would be the law if the marriage had been contracted and the domicile of the parties to the marriage had been within this state. Civil Code, art. 2400, subjects "non-resident married persons" to the same provisions of law "as regulate the community of acquests and gains between citizens of this state," so far as relates to "all property acquired in this state." It is not necessary to give any technical meaning to the word "property" as used by the legislature. The object of the legislature, namely, to subject non-residents who acquire rights within the state to the same rules as those which govern resident citizens, is manifest, and leaves no doubt but that the word "property" included not only land and chattels, real and personal, but also all choses in action.

The exception must be maintained.

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Where a steamboat worth about \$35,000 or \$40,000 moored to the wharf in the port of New Orleans, and with only a watchman on board, on a dark night and in a gale of wind broke from her moorings, and, being without steam or other propelling power, drifted down the river to the peril of herself and other shipping, and the watchman on board rang his bell for assistance, which was rendered by two tugs, and the steamboat was towed by them with much trouble, and some risk to themselves and crews, to a place of safety: *Held*, that the service was a salvage service, and that \$300 was a reasonable allowance therefor.

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IN ADMIRALTY. Cross appeals.

Messrs. Joseph P. Horner and F. W. Baker, for libelants.

Mr. B. Egan, for claimants.

PARDEE, Circuit Judge. Out of the conflicting evidence in this case enough can be ascertained to show that on the 14th of April, 1879, at about 9 o'clock P. M., the steamer Henry Frank, a large steamboat, worth from \$35,000 to \$40,000, in a gale of wind blowing at about thirty-four miles per hour, broke away from her landing in this harbor, and without any steam or other propelling machinery, with only one man on board, was blown and drifted down the stream, to her own peril and the peril of other shipping in port. The watchman on board rang his bell for assistance, and two tugs, the N. M. Jones and the Maud Wilmot, went to her relief, got lines aboard, and towed her, after much trouble, in shore to a place of safety. The night was dark and the river rough; the service requested and rendered was valuable and necessary; and there was something more than ordinary risk and peril to the boats and men rendering the service. Yet the fact that the Canal street ferry-tug Jerry was running, shows that the service can hardly be classed as dangerous. The evidence is conflicting as to which tugboat first arrived, and which rendered the most efficient service, but I do not think it necessary to go into the question. The ship was adrift and helpless, and the libelants rendered services in picking her up and landing her in safety, and there can be no doubt of their claim for compensation as salvors. The district judge has allowed \$300 — three-eighths to the men, and five-eighths to the boat,— and I see no reason to disturb his judgment, unless it should be as to the rate of distribution between the libeling boat and the crew; but this is not asked, and the rate may be just, considering all the circumstances.

Let a decree be entered for the libelants the same as in the district court and for costs in both courts.

Excavating Company v. Lauman.

APRIL TERM, 1882.

ODORLESS EXCAVATING COMPANY v. LAUMAN.

A motion for injunction *pendente lite*, to restrain the infringement of a patent, was heard upon the bill, affidavits and other proofs, before answer. *Held*, that upon the showing that the validity of the patent had been sustained by a decree of a court of the United States, and that the defendant had infringed, the injunction should issue.

Heard upon motion for injunction *pendente lite*.

Messrs. G. A. Breaux and *H. H. Hall*, for complainant.

Mr. C. W. Besançon, for defendant.

BILLINGS, District Judge. This case is submitted on an application for an injunction to prevent infringement. Complainant is the owner by assignment of two patents—the Strauss patent, issued to Louis Strauss, January 28, 1868, and the Painter patent, issued to William Painter on the 5th day of August, 1873. The Strauss patent was for “an improvement in apparatus for cleaning privies,” and consists in the combination of a reservoir or receiving tank, a deodorizer whereby the fetid air is passed over burning charcoal or a gas-burning stove, and a forcing pump, together with an apparatus for emptying privy vaults. The invention set forth in the Painter patent is for “an improvement in pump valves,” to be used in “combination with a flap valve, the stiffeners or braces being arranged to prevent collapsing.” Complainant shows that the validity of these two patents under which it claims has been confirmed by a decree of the United States circuit court for the fourth circuit and district of Maryland, in the case of this complainant and Burton A. McCauley. The only question, therefore, is that as to infringement. The evidence upon the point of infringement is a description of defendant’s method by August Guerin, and the opinion of Joseph Jouet. This testimony is very explicit, and, if the facts stated by Guerin and the opinions and deductions of

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Jouet are correct, show an infringement of both patents. To meet this evidence, the defendant introduced the affidavits of Michael Kern and Peter Frisht, which substantially deny any infringement. The affidavit is a joint one, and is largely in the nature of an opinion, and while its language shows scientific discrimination, it is not stated or shown that the affiants are experts.

I think, therefore, the injunction should issue with leave to the defendant to move to dissolve upon his filing his answer upon fuller showing, if he shall so be advised. Let the injunction issue.

BOATMEN'S SAVINGS BANK v. WAGENSPACK.

1. If an opposition is filed to an order of seizure and sale, the order becomes merely a process introductory to a litigation.
2. After an order of seizure and sale has been granted in a state court, and an opposition has been filed and an injunction obtained, and the cause is then removed to a court of the United States, the order may be reviewed by the latter court upon a rule to show cause why it should not be set aside.
3. But if the ground of opposition relates to the insufficiency or incompetency as proof of the authentic act of mortgage, the controversy should be considered only at the final hearing.

IN EQUITY. Heard upon motion to set aside an order for seizure and sale.

Messrs. David N. Barrow and George L. Bright, for complainants.

Mr. J. R. Beckwith, for defendants.

BILLINGS, District Judge. This cause is submitted on a rule to show cause why the order for executory process should not be set aside as having been granted upon insufficient evidence.

An order of seizure and sale had been issued in one of the state courts. An opposition had been filed and an injunction obtained, when the cause was, upon the petition of the

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mortgagor, removed to this court, where he has taken this rule.

It is objected (1) that this is a motion for a new trial of a matter tried and adjudged in the state court, or an effort to enjoin a cause or proceeding pending or undecided in a state court. The sufficiency of this objection depends upon whether the order of seizure and sale has been transferred to this court, or now remains as a decree in the state court. It is objected (2) that the order for seizure and sale cannot be reviewed upon an order to show cause, but only upon an appeal. The conclusiveness of this objection, as well as that of the first, must depend upon the nature and character of this order under our law, and therefore I shall consider both objections together. The record shows the petition for an executory process; a conditional order for such a process, *i. e.*, an order that there be a seizure and sale, after due demand, the lapse of three days, a writ of seizure and sale, the filing of an opposition, and an injunction granted restraining the Boatmen's Savings Bank from further proceeding by executory process with the execution of the order of seizure and sale issued in the above-entitled cause, or from seizing the mortgaged property; a responsive pleading, termed a peremptory exception, filed by the party who claims as mortgagee; and lastly a petition in a cause entitled Boatmen's Savings Bank to the mortgagor, by the mortgagor, for a removal, and an order in a cause similarly entitled that "this cause be removed."

There had been a conditional order of sale, an injunction of that order, an exception, and a transfer of the cause. It is the cause which is transferred. What is the cause? The C. P., arts. 732 to 753, inclusive, gives this right to executory process, and the manner in which it may be judicially resisted and finally arrested. The mortgage creditor may seize, the mortgagor may oppose and enjoin, and thus the issue is made. That issue is as to the right of the mortgagee to have the summary process, and that issue constitutes the cause or controversy. If the judgment is in favor of the

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mortgagee, the seizure and sale are enforced. If in favor of the mortgagor, they are perpetually enjoined. The cause or controversy includes all the proceedings incidental to its decision. Jurisdiction is obtained, and can be operative only by control over the seizure. The removal of the cause, therefore, brings with it all orders issued therein. The order of seizure and sale, unless there is opposition, is a final order; if there is opposition, it is a mere process introductory to a litigation. This view is distinctly announced by the supreme court of the United States in *Levy v. Fitzpatrick*, 15 Pet., 167. This is also the view of the supreme court of this state as to the nature and function of this proceeding. In *Harrold v. Voorhies*, 16 La., 254, the court says:

“But such a decree is not a judgment, in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides on no issue made up between the parties, nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside. After rendering this decree he would be divested of all jurisdiction, and it could be reversed only by means of an appeal, or a separate action of nullity; whereas it is every-day practice for the judge issuing such orders to set them aside on an order to show cause or an opposition; and in most cases the proceedings are turned into an ordinary suit, in which a final judgment is afterwards rendered. Such a decree, then, can be viewed only as giving the aid of the officers of justice to execute an obligation, which by law produces the effects of a judgment in relation to the particular mortgaged property.”

These orders are issued in France by notaries, who are there *quasi* judicial officers.

The order for executory process is in form a decree or judgment, but it is in substance only an order *ex parte*, founded on the consent of an absent defendant, and only a proceeding *in rem*; for no judgment can be given against the

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mortgagor for any deficiency. When the issue is made up by the opposition, this order, though first in time, becomes merely an incident to a cause. When the cause is transferred to the circuit court, this order comes as a part of it. Section 4 of the act of March 3, 1875, provides that "all orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." That is, they become the orders of the circuit court.

It is urged that the decision of *Barrow v. Hunton*, 99 U. S., 80, is in point. But the distinction is that there was a final judgment, the definitive character of which was absolute, and the question was whether any other court could by its decree operate upon it to annul it. Here is no judgment, provided there is an opposition, but only an order which initiates a judicial controversy, and the maintenance of which depends upon the result of that controversy.

There is no doubt that, as is contended by the solicitors for the mortgagor, it is well settled now by the supreme court of the state that the order for executory process can be reviewed only by appeal. See *City of Shreveport v. Flournoy*, 26 La. An., 709; *Heft v. Kelly*, 17 La. An., 143; *Naughton v. Dinkgrave*, 25 La. An., 538. But this result has been reached merely as a rule of practice and not from the intrinsic nature of the proceeding, and as a rule of practice it ceases to have any force when the cause is transferred to the equity side of the United States circuit court; there the practice in equity governs. By that practice even a final decree may be set aside at any time during the term at which it is rendered. *A fortiori*, a provisional interlocutory order may be so set aside. That such a cause pending in the circuit court is to be dealt with as a cause in equity, is decided in *Marin v. Lalley*, 14 Wall., 14.

Now, as to the manner in which this matter of the insufficiency or incompetency of the authentic proof can be passed upon. It seems to me that that is the entire controversy, and that it must be passed upon by the court by a final decree,

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otherwise the chief and in this case the only question in the case would be decided by an interlocutory order, without any termination of the cause, and in case the decision should be in favor of dissolving the order, would leave the mortgagee without opportunity to continue his seizure by a suspensive appeal, which, in justice, he ought to be placed in a position to have, and would deprive him of the right to elect to turn his proceedings into a suit for foreclosure *via ordinaria*.

The rule is, therefore, discharged, as presenting a matter which must be considered upon a final hearing, when a decree can be rendered which will dispose of the case.

AT CHAMBERS, SEPTEMBER, 1882.

NEW ORLEANS WATER-WORKS CO. v. ST. TAMMANY WATER-
WORKS CO.

1. A circuit court of the United States has jurisdiction, without regard to the citizenship of the parties, of a bill filed by a water-works company having by its charter the exclusive right of supplying a city with water, to restrain another company organized under a general law of the legislature from erecting competing water-works.
2. A charter granting the exclusive right to a water-works company to supply a city with water is a contract with the state, which is protected from impairment by the constitution of the United States.
3. Private property cannot be taken or vested rights impaired by the legislature without compensation, upon the claim that the acts are done in the exercise of the police power of the state.

IN EQUITY. Heard on motion for an injunction *pendente lite*.

Messrs. E. H. Farrar and J. R. Beckwith, for complainant.

Messrs. G. L. Hall, T. L. Gill and C. F. Buck, City Attorney, for defendants.

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PARDEE, Circuit Judge. The hearing is on the bill, exhibits and affidavits. The case as made shows:

That in March, 1878, and for years prior thereto, the city of New Orleans was the owner and in possession of a system of water-works for the supplying of the said city, and the houses and inhabitants thereof, with water, acquired from the Commercial Bank of New Orleans under grants and legislation of the state giving the said city the necessary authority and privilege therefor exclusively forever.

That the said city was embarrassed in the financial management thereof, and was indebted therefor in the large sum of \$1,393,400, which indebtedness was represented by outstanding bonds issued by the city, running forty years from date and bearing five per cent. per annum interest, known as the "water-works bonds."

That in 1877, in order to relieve the said city from its embarrassment growing out of its indebtedness, the legislature of the state of Louisiana, at an extra session held in that year, passed and adopted an act entitled "An act to enable the city of New Orleans to promote the public health; to afford greater security against fire by the establishment of a corporation to be called the New Orleans Water-Works Company; to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of the city of New Orleans an adequate supply of pure and wholesome water, and to permit the holders of water-works bonds to convert them into stock and to provide for the liquidation of the bonded and floating debt of the city of New Orleans."

That said act provided that a corporation be created, to be known as the New Orleans Water-Works Company, and among other things provided that the holders of the "water-works bonds" might convert them into the capital stock of the said company, and that, when so converted, the said bonds should be surrendered and canceled; that there should be issued to the city of New Orleans stock amounting to the sum of \$606,600, in full-paid shares of stock, and an additional

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full-paid share of stock to every \$100 of the said "water-works bonds" which she had paid, taken up or funded, and that for the purpose of carrying out the provisions of the act all of the certificates for all of the stock in the said company should be issued to the city of New Orleans; one set of certificates, equal in value and amount to the then outstanding par value and amount of the said "water-works bonds," being held by the city to be exchanged for the said bonds, with the holders thereof, and the other set of certificates being held by the said city in her own right and in trust for the holders of all her other bonded and floating indebtedness.

And that it was also provided in the said act that the said water-works company should be organized by the mayor of the city giving thirty days' notice that he would receive subscriptions of bondholders who may agree to exchange their said bonds for the stock aforesaid, and that the city should subscribe to the amount of her interest and the bonds redeemed or funded by her, as soon as the sum of \$500,000 in par value should have been subscribed by the holders of the water-works bonds, and the bonds surrendered and canceled as provided in the act, and that thereupon the company should be organized with a board of directors — four to be appointed by the mayor of the city, and three to be appointed by the stockholders other than the city.

That all the conditions and provisions of said act were accepted and complied with by said city, and by the holders of said "water-works bonds," who made the subscriptions required by the act in manner and form as required, so that in March, 1878, the said company was duly organized, and thereupon said company agreed to and accepted all of the conditions of the said act, as well as those of an amendatory act passed February 26, 1878, the provisions of which it is not necessary to recite, whereby the complainant became and was vested with corporate character, and with all the rights and privileges granted by the said act No. 33, extra session 1877, and the amendatory act thereto of 1878; and there-

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upon the city of New Orleans, as provided by the said acts, did by notarial act transfer, set over and grant unto complainant all its rights, title and interest in and to the water-works in said city, as it had acquired the same from the Commercial Bank of New Orleans, and all subsequent additions thereto.

That by reason of the premises the complainant became and was vested with full and absolute and complete title to all the said water-works, and to all the privileges acquired by the city of New Orleans from the Commercial Bank of New Orleans, and the exclusive right of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, and any other stream or river, by means of pipes or conduits, and the right of constructing any necessary works, engines or machinery for that purpose, for the period of fifty years from and after March 31, 1877.

That the said act No. 33 of 1877, aforesaid, also conferred upon complainant the right to increase the capital stock of the corporation, and to borrow money for the purpose of improving and enlarging its works, etc., and for this latter purpose complainant was authorized to issue bonds of the company to an amount not exceeding \$2,000,000, and in such sums and on such terms as the complainant might determine, securing the same by mortgage on all the property and franchises of the complainant, acquired and to be acquired; but the said bonds were not to be issued nor disposed of except upon the consent and approval of the council of the city of New Orleans.

That for the purpose of enlarging and improving the water-works, and in compliance with said act, complainant has expended large sums of money, and has, with the consent and approval of the council of said city of New Orleans, made, issued and disposed of a large amount of bonds, secured by mortgage on its franchises and works, and has received the proceeds thereof and devoted them to the enlargement and improvement of the works, to supply the said city and its inhabitants with water.

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That complainant has in all things acted in good faith; that it accepted the terms and conditions of said act of the legislature only after having obtained the full consent of the city of New Orleans; that complainant supposed that it was obtaining the full and exclusive right and privilege of supplying the city of New Orleans with water by a system of public water-works, to the exclusion of all other companies, otherwise complainant would never have accepted the terms and provisions of the said act of the legislature.

That it was by reason of the exclusive right so as aforesaid granted that complainant was able to borrow money and negotiate the said bonds.

That in order to continue to comply with the terms of and provisions of said act, and make the water-works competent to an adequate supply of water in said city of New Orleans, complainant will be compelled to borrow large sums of money to be expended thereon; and that unless the exclusive rights and privileges of complainant are protected and preserved, complainant will be absolutely without credit or means to borrow money or negotiate bonds to carry on the necessary enlargement and improvement of the water-works.

That by reason of the premises the city of New Orleans and the state of Louisiana became, and were obligated in equity and good conscience, to warrant, maintain and protect complainant in the full right and exercise of its exclusive rights and privileges aforesaid, and that the obligations of a contract grew up and were created between the said state and city and complainant; which contract, it is claimed, was and is sacred under and by virtue of section 10 of article I of the constitution of the United States.

That the new constitution of the state of Louisiana, adopted in December, 1879, article 258, provides that "the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished."

That the defendant company has been lately incorporated

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under the general incorporation law of the state, with the avowed purpose of establishing a system of water-works to supply the city of New Orleans and the inhabitants thereof with water, in competition with complainant, and are holding out and pretending that by virtue of said provision of the constitution of 1879, and of their act of incorporation, and the privileges they will obtain from the council of the city of New Orleans, they have full right and will establish a competing system of water-works in said city.

The defendant has obtained an act of congress authorizing the laying of pipes and mains across Lake Pontchartrain, and has applied to the council of the city of New Orleans to pass ordinances giving the right to said defendant to establish competing water-works, and lay down in the streets of the city pipes and mains to that end.

That it is probable the members of the city council will collude with the said St. Tammany Water-Works Company, and pass some ordinance or ordinances granting rights and privileges to said St. Tammany Water-Works Company in conflict and in competition with the rights of complainant.

That the proceedings and pretensions of the defendant have already injured the complainant, and if continued will undoubtedly inflict irreparable damage.

The bill herein is filed to protect complainant's rights by enjoining the defendants from further action in the premises. As to the pending matter, the issuing of an injunction *pendente lite*, the case seems so narrow that counsel have argued but two questions, namely:

(1) Has the court jurisdiction? (2) Does the constitution of the United States, § 10, art. I, protect the complainant against the repeal of the monopoly features of its charter, as declared in article 258 of the constitution of the state of Louisiana, adopted in 1879?

The statement of the second question seems to dispense with argument as to the first. No question could more clearly show "a matter in dispute, arising under the constitution of the United States." And in such a dispute original

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jurisdiction is given the circuit courts of the United States by the act of March 3, 1875. The complainant has no case if the article 258 of the Louisiana constitution of 1879 has the force and effect that its terms import. The defendant, the St. Tammany Water-Works Company, has no defense to the complainant's case unless article 258 of the Louisiana constitution has the force and effect of repealing the exclusive features of complainant's charter. Said article undoubtedly has such force and effect, except in so far as it is in violation of the tenth section of article I of the constitution of the United States. Thus a question is at once raised as to the construction, force and effect of an article of the federal constitution, and such question seems to be decisive of the issue between the parties.

The following propositions are declared by the supreme court to be now too firmly established to admit of or to require further discussion:

"That a case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. That cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted. That except in the cases of which this court is given by the constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact

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or of law may be involved in it." *Railroad Co. v. Mississippi*, 102 U. S., 141.

It would seem, then, that the court has jurisdiction and will be called on to proceed with this case — to determine all issues of law and fact that may be raised therein. Ought an injunction to issue pending such determination? The showing made is to the effect that the proceedings of the defendants are very injurious to the complainant in depreciating its stock and bonds, and directly lowering, if not ruining its credit, in hindering and obstructing complainant in carrying on and carrying out the extensive works and improvements it is charged with by the legislature of the state. Whether this is being done rightfully or wrongfully is the real issue in the case. The *prima facie* showing is against its being rightfully done, and therefore there is a *prima facie* showing for the issuance of an injunction.

The learned counsel who have appeared for the St. Tammany Water-Works Company have very ably and learnedly urged that the question of supplying the inhabitants of a great city with water was one arising under, and under the control of, the police power, and therefore could not be the subject of a contract within the protection of the federal constitution. This proposition may be taken for granted, so far as this case is concerned at this time, and yet not affect the matter before the court. There is no suggestion in this record that the police power of the state has been directed against the complainant, or that any portion of it has been delegated to the St. Tammany Water-Works Company. So far as this record shows, or the court is advised, the last exercise of the police power of the state in relation to the supplying of water to the inhabitants of the city of New Orleans, was when the sovereign in the state clothed the complainant with the powers, privileges, rights and duties it is now asking the court to protect. Certainly it cannot be pretended that the last clause of article 258 of the state constitution has delegated anything in the way of inaugurating and

maintaining public water-works in the city of New Orleans to the defendants.

In *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, decided at the November term of this court in 1881, reported in 9 Fed. Rep., 743—a case identical in principle with this,—there had been a delegation of power to regulate slaughter-houses, etc., to the city authorities (see article 248 of the Louisiana constitution of 1872), and the city authorities had acted in the premises. In that case the same authorities (*Beer Co. v. Massachusetts*, 97 U. S., 25; *Fertilizing Co. v. Hyde Park*, id., 659; *Stone v. Mississippi*, 101 U. S., 814) as are cited here were examined, and their inapplicability shown, and both the circuit judge and district judge, in separate opinions, decided in favor of the jurisdiction and of granting an injunction.

I am still disposed to adhere to that decision, and I regard the case under consideration as equally strong on the question of jurisdiction, and much stronger on the facts. And here I desire to remark that there seems to me to be a great misapprehension as to the force and effect and proper exercise of the police power of a state. Its power and far-reaching effect may perhaps not be measured by general rules and definitions, and each case as it arises may have to be determined on its own particular facts and circumstances.

It seems, however, to be clear to me that regulations pertaining to the public health, manners and morals come within its jurisdiction, and that, therefore, whenever any business, occupation, rights, franchises or privileges become obnoxious to the public health, manners or morals, they may be regulated even to suppression, individual rights being compelled to give way for the benefit of the whole body politic.

It seems equally clear to me that when, in the exercise of the police power, private property or private or vested rights must be taken for public use in order to carry out, or allow to be carried out, improvements and regulations, or to carry on business or occupations, or schemes of public works, look-

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ing to the amelioration and benefit of the public health, manners or morals, such private property or private rights of property must be entitled to the protection given by the constitution of the United States, declaring, "nor shall private property be taken for public use without just compensation" (see U. S. Const., Fifth Amend.), and by articles 155 and 156 of the constitution of Louisiana, declaring:

Art. 155. "No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed, *nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made.*"

Art. 156. "Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

All property of corporations or individuals is owned subject to the proper exercise of the police power. If my lot of ground is needed for a public hospital or jail, no doubt I am entitled to compensation before it can be taken from me. If my vested rights are needed to supply the city of New Orleans with pure water, must I not likewise be compensated?

The arguments usually addressed to the courts in cases like the one under consideration are generally based on the assumption that the sovereign, in exercising the police power of the state, is absolutely unfettered with regard to all the rights of individuals and all the rights of property. I am not prepared to take this advanced ground, and therefore, having jurisdiction, I feel compelled to enjoin the St. Tammany Water-Works Company from further proceedings necessarily resulting in the confiscation or appropriation, without compensation, of the vested rights of the New Orleans Water-Works Company.

So far as the city of New Orleans is concerned, although the city attorney has entered an appearance for her, no steps have been taken in her behalf as against complainant, and a decree *pro confesso* has been entered. Although from the showing made by complainant it would seem probable that

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some members of the city council are disposed to act with the St. Tammany Water-Works Company in depreciating the stock and bonds of complainant, and in hindering the performance of the works and duties devolving on complainant, yet it hardly seems probable that such adverse action can be secured from the city government. Considering the very large interest the city owns directly in the stock and property of the New Orleans Water-Works Company, and particularly in view of the fact that as the city of New Orleans is the vendor and warrantor of the property, rights and privileges she transferred to the water-works company, and was and is the chief beneficiary in the financial schemes provided by the legislature by which she was relieved of an oppressive bonded debt, any successful adverse action on her part would subject her, in equity and good conscience, to the payment of every dollar of the original "water-works bonded debt," and perhaps also to the payment of all the bonds and paid stock of the water-works company.

It would thus seem that in this controversy both individual interest and good faith would control the city's action. At all events, the restraint by injunction of the legislative action of a corporation is of doubtful propriety, and I am indisposed to grant such order; particularly so when complainant will lose no substantial advantage thereby, as an injunction can readily issue as soon as legislation takes any form susceptible of execution. That any rights of the defendant the St. Tammany Water-Works Company may be saved, the complainant will give adequate security.

Let an injunction issue as prayed for against the St. Tammany Water-Works Company, on complainant's giving bond in the sum of \$20,000, with good and solvent security, conditioned to repay all damages resulting to the defendants from the issuance of said injunction, should it be hereafter determined in this court, or on appeal, that said injunction was wrongfully or improvidently issued.

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1. The statute of Louisiana, which, in case of wrongfully caused death, continues to the next of kin the right of action for the damages inflicted on the deceased person, was intended to establish a rule of survivorship for the government of the community who constitute the state of Louisiana, and could not include a cause which does not concern its inhabitants, or did not originate within its territory; and it could not, in such latter case, give a lien or authorize an action against a vessel.
2. No action can be maintained in the admiralty courts of the United States, by the widow or next of kin, to recover damages sustained by them on account of the death, tortiously caused, of the husband or other kinsman upon the high seas.

IN ADMIRALTY. Heard on exception to the libel.

Messrs. J. D. Rouse and Wm. Grant, for libelants.

Messrs. W. S. Benedict and A. J. Murphy, for claimants.

BILLINGS, District Judge. This is a suit brought by the widow of Peter Peterson, deceased, the father and mother of Gustaf Leander Joussen, deceased, and the mother and sister of Erick Anderson Holm, deceased, claiming damages against the steamship E. B. Ward, Jr., which they have respectively suffered by the death of a husband, a son, and a son and brother, tortiously produced by a collision between the bark Henrick with the E. B. Ward, Jr., through the fault of the latter. The collision and deaths took place upon the high seas and within the territory of no nation. One of the colliding vessels, the Henrick, was a Swedish vessel, and the other, the E. B. Ward, Jr., was a vessel of the United States, the home port of which is the port of New Orleans. The damages are laid doubly: (1) As the damages suffered by and surviving from the deceased person; and (2) the damages suffered by and accruing directly to the libelants, respectively, by the death of their respective relatives. There is no allegation of loss of service after the tortious

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act and before death. There is also a claim for the loss of personal effects belonging to each of the deceased relatives.

1. So far as relates to the damages suffered by the intestates, which are claimed to have survived to the libelants respectively. The statute of Louisiana stands alone, so far as I have been able to consult the modern statutes, in continuing, in case of a wrongfully caused death, to the next of kin, a right of action for damages caused to a deceased person. The statutes of all the other countries and states, so far as they have created or allowed actions arising out of the death of other persons, have been for loss or injury which the living members of the family suffered themselves by the death of the family head or family member. The statute of Louisiana (Civil Code, art. 2314) merely qualifies, or rather, so far as concerns husband, wife, children and parents, supplants, the civil and common law maxim, *actiones personales moriuntur cum persona*. I do not think this change in the quality of an action for damages was designed to or could affect the case of persons who as libelants were subjects of the kingdom of Sweden and there domiciled, having no relation to the state of Louisiana, and when the cause of action arose wholly outside of that state. This question would be precisely the same and must have the same answer in the courts of common law and the courts of admiralty. The operation of the statute was intended to be confined to establishing a rule of survivorship for the government of the community who constitute the state of Louisiana, and could not include a cause which did not concern its inhabitants and did not originate within its territory; and, least of all, could it give a lien upon or authorize an action against a vessel. *Whitford v. Panama R. Co.*, 23 N. Y., 465; *Mahler v. Transp. Co.*, 35 N. Y., 352.

2. The claim for damages suffered directly by the libelants brings up the whole question whether, in case of the death of a person tortiously caused upon the high seas, an action may be maintained in the courts of admiralty of the United States by the next of kin for damages which that death

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wrought to them. I cannot find that the supreme court of the United States has committed itself at all upon this question. In the prohibition case, *Ex parte Gordon*, 104 U. S., 515, they affirm the jurisdiction — the power of the admiralty courts to decide this question, — but they guardedly abstain from saying as to whether there could be a recovery. But the courts of common law always had the jurisdiction, and the right to recover was, nevertheless, always denied. Nor has this question been adjudicated in any of the district or circuit courts. In *The Sea Gull*, decided by Chief Justice Chase, page 145, Chase's Decisions, and in *The City of Houston*, decided by myself, and affirmed by Judge (now Justice) Woods, the death happened and the damage arose within the body of the county, upon waters where the statute law of a state within which those waters were situated gave the right of action. The cause of action, therefore, existed by force of the territorial statute, and since it constituted a tort, and was upon navigable waters and occurred in a case of collision, the court of admiralty could enforce it in a proceeding *in rem*.

It is needless to multiply authorities when all are concurrent. But it may be stated that both in the common law and in the admiralty, in the courts of England and the United States, except in cases affected by statutes, it has been uniformly held that the death of a person could not constitute a cause for a civil action.

No stronger case could be put than that of *Insurance Co. v. Brame*, 95 U. S., 754. That case arose in Louisiana. The plaintiffs in error had insured McElroy's life. Brame tortiously killed him, whereby the plaintiffs were compelled to pay, and did pay, the amount insured upon his life, and under the law of Louisiana, which provides that (Civil Code, art. 2315) "every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it," brought an action for damages, and yet the court rejected the plaintiff's demand to be indemnified. The ground upon which the decision is put is that the damages of the in-

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insurance company were too remote to be allowed. If the supreme court, in construing such a statute, adopt, not the conclusion of the common law, but the reason upon which that conclusion is based, it must follow that the force of the reason would be the same, and the conclusion is the same, in a case coming before it from courts of admiralty. It is equally true that among the Saxons and the tribes of Germany and at Rome, such an action was, to a certain extent, permitted. Ruth. Inst. Nat. Law, book 1, c. 17, § 9; Grotius, Lit. 2, c. 17; and Puff. Law of Nat., book 3, c. 1, § 7. Puffendorf, perhaps, lays down the limits within which the early law permitted an individual action or suit more clearly than any other writer. He says.

"The unjust slayer was obliged to defray the charge of physicians and chirurgeons, and to give to those persons whom the deceased was, by a full and perfect duty, bound to maintain, as wife, children and parents, so much as the hope of their maintenance shall be valued at."

The doctrine of England and the United States, in refusing all private redress, seems to have been established at the early inception of constitutional government in that kingdom. So early as the fourth of James I, which was in 1607, we find it held by Tanfield, J.:

"If a man beat the servant of J. S., so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery it is now become an offense to the crown, and drowns the particular offense and private wrong offered to the master before, and his action is thereby lost." *Higgins v. Butcher*, Yelv., 89.

In *Baker v. Bolton*, 1 Camp., 493, which was an action by a husband for damages for the death of a wife, Lord Ellenborough stated the law to be that in a civil court the death of a human being cannot be complained of as an injury. Baron Comyns, in his digest, under the head of "Action on the Case," after enumerating cases where the action will lie, gives the cases of "a man killing the servant of another,"

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and "the battery of a wife, of which she died," as instances where the action will not lie under the subdivision, "For an act of another nature," which I understand to mean for an act for which redress is public and not private. If we can arrive at the reason of this doctrine — this refusal of the law to entertain this sort of action — we shall derive much aid in our inquiry.

It has been suggested by some writers that the reason of the doctrine was that a human life transcended all monied value. But Puffendorf makes a distinction which shows that that could not have been the only reason, for he says the reparation is not for the value of a life, but merely for the value of the interest which those dependent upon the deceased had in the support derived from them. Other writers urge that it sprung entirely from the system of feudal law, whereby, since in case of felony the goods and estate of the felon became forfeited to the crown, there would be nothing remaining out of which to satisfy any private demand. But, I think, while the ground for the doctrine was in part both these, the principal ground was that the life of a subject was, so far as could it be capable of proprietorship, the property of the government; that the justice which was to be satisfied was, therefore, public justice; that the deceased person and his family were viewed by the law only as members of the state; that the public, through the government, inflicted the punishment and received the amercement, and, so far as necessity existed, provided for the family, and therefore private redress or satisfaction was excluded. This subordination of reparation for the individual to the justice of the country is given as the ground of postponing, even in the case of lower offenses than murders which amount to felonies, all private actions till after the criminal trials. See opinions *seriatim* of Lord Ellenborough and Grose, J. (*Crosby v. Leng*, 12 East, 409). Now, if we examine the statutes of Great Britain and the various states of the Union, we find that they in no instance authorize the action upon the doctrine of property in human life. They

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limit the amount of damages as in case of a fine. They permit such an action to be brought only in favor of those who would naturally be dependent upon the person slain, and, after his death, upon the state; and the effect of the action is, *pro tanto*, to relieve the state of a public charge. The suit for damages becomes a private action, and the right of action, when once attached by the local law to the act of killing, may be enforced in the courts of any country to the same extent as any other personal action (*Dennick v. Railroad Co.*, 103 U. S., 11); but the statutes are enacted in furtherance of public justice. The purpose of the statute is by civil remedy still further to atone for a wrong to the state.

Neither Lord Campbell's act (9 and 10 Vict., c. 93), nor the remedial statutes of any of the states of the United States, so far as I have been able to examine them, gives the creditors of the person killed any right to recover damages; and, under the Massachusetts statutes (St. 1840, c. 80), the procedure is to be by indictment, and the reparation by fine not less than \$500 nor more than \$5,000, which is to be given by the state to the widow, and if there is no widow, to the heirs.

My conclusion, therefore, is that the recent statutes, beyond their territorial force, tend rather to uphold and supplement the principle upon which private actions were prohibited, leaving the matter of what prosecutions and actions shall follow the killing of a member of the state, with what limits and conditions, to be determined by that department of the government which regulates the infliction of public justice.

According to this view the courts of admiralty are controlled by the statutes of the country upon the subject — equally with the common law courts, — and, when the statute has given no remedy, are powerless equally with the other courts to give reparation.

There are two acts of parliament which give the English admiralty courts complete power to award damages in such a case as this: Lord Campbell's act, which gives a right to

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recover damages, and the "admiralty court's act" (1861), 24 Vict., c. 10, which extends that right to ships, by declaring that "courts of admiralty shall have jurisdiction over any claim for damages done by any ship." Independently of these statutes, the English courts of admiralty could not give these damages. So far as they have recently given them they have simply recognized and enforced what parliament has enacted.

It would be a serious question to what extent legislatures of the states of the Union could make any law which would affect torts perpetrated by vessels upon the high seas, since this whole subject is but an incident of commerce, the regulation of which is by the constitution vested in the congress. Article I, § 8. But the power of the congress of the United States over the whole subject is absolute. It can make a law which shall affect its shipping, leaving to treaty or comity the application of the laws of foreign nations to their shipping; or they may make laws which shall operate upon its admiralty or other courts and include all vessels. The congress has already established such a rule for the courts of the United States with reference to one class of acts. It has already provided that there shall be a right of action to recover damages for any deprivation of rights secured by the constitution, and in case of death caused by such wrongful act, legal representatives may recover not exceeding \$5,000 for benefit of widow, and if no widow, for benefit of next of kindred. Rev. St., sec. 1981, p. 344. If such a deprivation were caused to the citizens of the United States upon the high seas, undoubtedly the courts of admiralty of the United States could award the damages. The congress has but to extend this rule for our courts to all collisions or torts resulting in death, committed on the high seas, which may affect the ships or be brought before the courts of the United States. Until that is done—until the law-making or treaty-making power has created this right and affixed its limitations—courts cannot decree damages in actions by one person for the death of another upon the high seas.

Except so far as relates to the personal effects, the exception to the libel is maintained.

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DANIEL WEAVER AND OTHERS V. SPENCER FIELD AND OTHERS.

1. The pendency of a suit in a state court for the foreclosure of a mortgage is not a bar to a suit in the circuit court of the United States between the same parties for the foreclosure of the same mortgage.
2. The *fiat* of a judge or court, directing executory process to issue on a mortgage given to secure the payment of money, cannot be pleaded as *res judicata* in bar of a suit brought to foreclose the mortgage.

IN EQUITY. Heard upon demurrer to the bill.

Messrs. J. D. Rouse and Wm. Grant, for complainants.

Mr. R. H. Marr, for defendants.

PARDEE, Circuit Judge. The original bill, in addition to the usual allegations in cases of foreclosure of a mortgage, alleged that:

"Heretofore, to wit, on the 5th day of February, 1878, he (complainant Weaver) presented his petition to the sixth district court of the parish of Orleans and filed the same therein, together with said notes above described, and a copy of said act of mortgage, and prayed executory process thereon, which was granted, against said Spencer Field; and after due demand for payment, executory process issued from said court, and said property was advertised for sale by the civil sheriff of the parish of Orleans by virtue of said proceedings, the same being entitled *Daniel Weaver v. Spencer Field*, and numbered 9804 upon the docket of said court. And afterwards the said Spencer Field brought suit in said sixth district court against Daniel Weaver to enjoin said sale, and obtained an injunction *pendente lite* suspending proceedings in said suit No. 9804, and said injunction suit still remains undecided. And your orator avers that said Field is without right to enjoin said sale, and that his proceedings are dilatory; that said injunction was obtained without bond, and said defendants are and have been enjoying the revenues of said property during the pendency of said proceedings, and have neglected to pay the taxes thereon. And your orator alleges that said property is insufficient to pay the

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amount due under said mortgage, including taxes and expenses, and that each of said defendants is insolvent, and that a receiver is necessary to administer the property."

To this bill the defendants interposed a plea setting out the proceedings in the two suits in the sixth district court of the parish of Orleans more fully, and claiming that the pendency of those proceedings operated as a bar to the further proceedings in this court under the bill. This plea was set down for argument, and on the hearing the plea was overruled, reserving to the defendants, on the coming in of an answer showing that the property mortgaged was in the possession of another court, the right to apply for a stay of proceedings until the property should be released from the custody of the law. Thereupon the defendants filed their answer, among other defenses reiterating at length the pendency of the proceedings in the state court between the same parties on the same cause of action, and further setting out other proceedings between the same parties in the supreme court of the state, not necessary to further refer to. Replication was made to this answer in due time.

After the case was thus put at issue, complainants, on leave, filed a supplemental bill setting forth, in short, that they had discontinued the suit for seizure and sale instituted in the state court, No. 9804, aforesaid, and had caused the property to be released from seizure by the sheriff in that suit, and had caused the cancellation of all inscriptions of seizures, so that the mortgaged property was not now in the actual or constructive possession of any other court, but was in the undisturbed possession of one of the defendants. And now the defendants come into the court and file a paper which is indorsed "Demurrer to supplemental bill," but which is a demurrer and argument to the jurisdiction of the court upon the face of the record.

Conceding that the defendants may raise this question at this stage of the case, and in this way, which is very doubtful, certainly the matter must be determined on the facts alleged by complainants, which are to be taken as true, and

not upon the matters pleaded in defense, either in the original plea or in the answer. The allegations of the original bill bearing on the matters urged to defeat the jurisdiction of this court have been recited in full. *Supra*. They were put in the bill as a basis for the appointment of a receiver, and not as at all supporting complainants' main demand for relief. These allegations show (1) that complainant had obtained from the state court executory process on the notes and mortgage herein sued on, and thereunder the sheriff of the parish of Orleans had advertised the mortgaged property for sale; (2) that defendants had instituted a suit in the same court against complainant to enjoin said sale under executory process and had obtained an injunction *pendente lite* suspending proceedings; (3) that the defendants were in the possession and enjoyment of the property.

These facts, it is urged, show that this court is without jurisdiction, and the whole contention here depends upon them, for if we bring in the matters pleaded in the supplemental bill, the suit in the state court for executory process is no longer pending to defeat our jurisdiction, if it ever had that effect. The two suits instituted in the state court, as set forth in the bill — one for executory process and one to enjoin — amount to no more than one suit to foreclose a mortgage. Where proceedings on a mortgage, *via executiva*, in the state courts of Louisiana are enjoined, whether under article 739 of the code or not, whether with bond or without, a suit is made for the foreclosure of a mortgage, substantially the same as is made by bill, answer and replication in a court of chancery in a like case. So that the question made here, divested of technicality, is whether the pendency of a suit in the courts of a state, for the foreclosure of a mortgage, will bar a suit in this court between the same parties for the foreclosure of the same mortgage. Unless there is something in the character of the suit to take it out of the general rule it is no bar. See *Hyde v. Stone*, 20 How., 170; *Stanton v. Embrey*, 93 U. S., 548; *Insurance Co. v. Brune's Assignee*, 96 U. S., 588; *Crescent City, etc., Co. v. Butchers', etc., Co.*, 12 Fed. Rep., 226.

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There are only two features in the suits in this case pointed out as taking the case out of the general rule: *First*, that the property is *in custodia legis*. *Second*, that the *fiat* of the judge granting executory process amounts to a judgment between the parties.

What effect possession by another court of the property on which the mortgage rested would have, it is not necessary to consider, for two reasons: (a) The court has already passed upon it, deciding that so long as the property is in the custody of another court no decree of sale will be passed. (b) The bill expressly avers the possession to be in the defendant.

As to the *fiat* of the judge or court, ordering, in default of payment within certain delay, that an order of seizure and sale issue, constituting a judgment between the parties, or having in any sense the force of *res adjudicata*, no better authority can be adduced than the decisions of the supreme court of Louisiana. That court has held in numerous cases:

"The decree is so far a judgment that an appeal will lie from it; but it is not a judgment in the true and legal sense of the term, and possesses none of its features. It issues without citation; decides no issue; adjudicates to the party obtaining it no right in addition to those secured in his notarial act; and need assign no reasons." See Hennen, Dig., 651, No. 5.

In general practice in this state it is well understood to have so little of "the force of the thing adjudged" that on very slight occasion the whole proceeding is turned into the action *via ordinaria*. Praying for citation, praying for a personal judgment, taking testimony, and praying for a judgment in answer to an injunction, or on a rule to dissolve, have each been held to avoid the *fiat* and change the proceeding into an ordinary suit. The order of seizure and sale is rendered upon a title importing a confession of judgment, but it by no means has the force of a judgment by confession. In fact, prior to the constitution of 1868, under statutes of 1861 and 1862, in the major part of the state this

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order could be granted by the clerks of the court. See Fuqua, Code Prac., 323.

In the case of *Stanton v. Embrey, supra*, it was decided by a full bench, upon authority, (1) that where a defendant appeared and pleaded in abatement the pendency of a prior suit in a state court, and, upon his plea being successfully demurred to, upon leave he answered to the merits, he waived his objections to the jurisdiction; (2) that the pendency of a prior suit in a state court is no bar to an action in another jurisdiction, even though the two suits are for the same cause of action and between the same parties. Either one of these propositions defeats the demurrer in this case, for the two cases are parallel in pleading and circumstances.

On the whole case I am well satisfied that the demurrer should be overruled, the court retaining the case. Since, as shown by the supplemental bill, the property is no longer actually or constructively *in custodia legis*, we can proceed to a decree unless the rights of the parties shall be first adjudicated in some other court.

An order overruling the demurrer will be entered, with costs.

**BRUM AND OTHERS V. THE MERCHANTS' MUTUAL INS. CO.
AND OTHERS.**

Where one incorporated company is consolidated with another under the name of the latter and transfers to it all its assets, the new company is liable for the debts of the old to the extent of the assets transferred.

The only contest was between the libelants and one of the defendants, the Home Insurance Company. A corporation known as the Home Mutual Insurance Company had been a partner in an association called the Harbor Protection Company, and as such had received large sums for salvage, in which the libelants claimed to have an interest,

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and to recover which the libel was filed. The Home Mutual Insurance Company, after it had received said salvage money and while it still held it, had been consolidated with and merged in another company known as the Home Insurance Company, a defendant in this case. The assets of the Home Mutual Insurance Company were all transferred to the latter company.

The case turned upon the question whether upon these facts the Home Insurance Company was liable to the libelants for their claims against the Home Mutual Insurance Company.

Mr. Richard DeGray, for libelants.

Messrs. Charles B. Singleton and Richard H. Browne, for defendant.

PARDEE, Circuit Judge. If the Home Insurance Company is bound for the liabilities of the old Home Mutual Insurance Company, then it owes this debt to the libelants, for there is no doubt that the partnership styled "The Harbor Protection Company" collected the salvage money, which, under former decisions of this court, belonged to the libelants, and that the Home Mutual Insurance Company was a partner in the Harbor Protection Company, and as such partner was liable for its virile share of the debts of said company.

The evidence with regard to the liquidation of the Home Mutual and the organization of the Home shows that the real fact, stripped of the forms with which the parties surrounded it, was that the assets, business, good-will and stock in trade—everything which could be relied upon belonging to the Home Mutual to pay and satisfy its outstanding liabilities—went into and constituted the capital and assets of the new Home. Calculations and arrangements were made as to the known liabilities of the old company, and some stockholders in the old company were allowed to withdraw their *pro rata* value of stock in cash; but the fact remains that the capital of the new company was exclusively made

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up of what was left of the assets of the old company. I have no doubt that everything was intended and carried out in the best of faith, and I am inclined to think that if the debts due libelants for salvage moneys had been known that they would have been provided for. As the Home took all the property of the old company, leaving nothing to pay the amounts due libelants, and as it took them, not as creditors, but as owner, it seems clear to me that it must pay the debts of the old company, at least to the amount of the assets converted. The claim of libelants — being in the nature of one for money had and received — would not be prescribed under the laws of Louisiana, where the obligation was created, and is one that ought not to be considered stale in an admiralty court.

The district judge held that the libelants were entitled to recover, and I concur in his judgment in this case. In the view I take of the facts, I do not find it necessary to pursue the line of reasoning showing the liability of the defendants because of the distribution made by the Harbor Protection Company to the Home Mutual, and the responsibility of the Home because of the identity of its officers, stockholders, etc., with the old Home Mutual.

Let a decree be entered in favor of libelants in the same terms as that of the district court, and for all costs.

GAYLOR V. COPES & PHELPS.

1. When a debt was paid in certain bonds which were afterwards decided by the court of last resort to be invalid and not the genuine obligations of the party by which they purported to have been issued, *held*, that the prescription of five and ten years did not begin to run against the debt until said decision.
2. Under the jurisprudence of Louisiana, whenever there is a sale, exchange or giving in payment of property, there is, unless waived by the contract, an implied warranty that the person so selling, ex-

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changing or giving in payment is the owner of the thing sold, exchanged or given in payment.

8. This rule applies when parties have settled their differences by a compromise, and property is transferred by one party to another in satisfaction of the compromise.

ACTION AT LAW.

The facts were as follows: Before the late civil war, the plaintiff consigned for sale to the defendants, who were a firm doing business in New Orleans, large quantities of cotton ties. The last lot of ties was forwarded just before the breaking out of hostilities, without any order from the defendants, and was of inferior quality, and did not give satisfaction to the persons to whom they were sold. About June 10, 1865, the plaintiff presented his account against the defendants, for cotton ties consigned to them before the war, for the sum of \$12,000 and four years' interest. A settlement of the claim was made by the parties, as follows: The defendants released the plaintiff from all reclamations for the inferior quality of the cotton ties consigned to them, and the plaintiff accepted in satisfaction of his claim \$3,000 in cash, five bonds of the Vicksburg, Shreveport & Texas Railroad Company at an estimated value of \$3,000, and other assets, which, with the money and railroad bonds, amounted to \$12,200. At the time of the settlement the defendants had other means.

The railroad bonds, after being held several years by the plaintiff without suspicion of their validity, were, at the close of a long litigation, declared by the supreme court of the United States not to be negotiable, and not binding on the company. Thereupon the plaintiff tendered back the bonds to the defendants, and demanded in lieu thereof the amount for which he had received them in payment, and upon their refusal to pay, brought this suit to recover the same. The defendants pleaded the prescription of five and ten years, to which the plaintiff filed an exception.

Messrs. J. H. Kennard, W. W. Howe and S. S. Prentiss,
for plaintiff.

Mr. H. N. Ogden, for defendants.

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PARDEE, Circuit Judge. The exception of prescription in this case is submitted on the allegations of the petition. The allegations of the petition show that the bonds in question were given in payment of a debt; that they were stolen; and that by reason thereof the petitioner has been evicted, his title failing, and his bonds being rejected. This eviction is charged as taking place in 1879. On this state of facts, the prescription of five or ten years is not acquired. Rev. Civil Code, 2659. See *Babin v. Winchester*, 7 La., 460.

The exception, therefore, should be overruled. On the trial, should such a different state of facts be shown as to justify the exception of prescription, it can be renewed.

Subsequently the cause was tried by a jury.

The controversy in the case was upon the question whether the defendants were bound to pay the plaintiff the amount for which he had received the bonds in payment. The jury returned a verdict for the defendants, and the plaintiff moved for a new trial upon a ground which will appear in the opinion of the court.

PARDEE, Circuit Judge. The theory of the plaintiff is that the bonds were given in payment, and that as the title has failed the defendants are bound on their implied warranty. The defendants claim that the whole settlement amounted to a transaction and compromise, and that therein no warranty of titles was implied, as there was no concealment or fraud.

The question in the case is one of law, and the jury has decided it in favor of the defendants. Is the decision correct?

The defendants rely on article 3083 of the Revised Civil Code of Louisiana, which reads:

“Where parties have compromised generally on all their differences which they might have had with one another, the titles which they then know nothing of, and which were afterwards discovered, are not a cause of rescinding the

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transaction, unless they have been kept concealed on purpose by the deed of one of the parties. But the transaction becomes void if it relates only to an object upon which it is proved by the titles newly discovered that one of the parties has no right at all."

There is no doubt that the parties compromised generally on all their differences, which were as to the amount due and what should be given and received in payment. This compromise was reduced to writing, as required by article 3071 of the code. For all the matters involved, all the differences settled, this compromise should have "a force equal to the authority of the thing adjudged." Rev. Civil Code, 3078. But the matter in issue here was not involved in that compromise. The ownership of the five bonds was not a difference between the parties at that time. Copes & Phelps held themselves out as the then owners of the bonds, with the power to transfer them. No doubt of this ownership then existed on either side.

There was nothing to compromise about it, no more than as to the ownership of the money paid over under the same compromise. Can it be contended that Copes & Phelps might have paid over counterfeit money and then shielded themselves under the compromise?

It seems to me that article 3073 of the code applies to this case:

"Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them. The renunciation which is made therein to all rights, claims and pretensions extends only to what relates to the differences on which the transaction arises."

It is not pretended that the title or ownership of the bonds on the part of Copes & Phelps was in any way a difference comprehended in the compromise by the intention of the par-

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ties as made and expressed, nor does it seem to me to be a necessary consequence of what was expressed.

It is well settled under Louisiana law that wherever there is sale, or an exchange, or a giving in payment, of property, unless waived by the contract, there is an implied warranty that the person so selling, or exchanging, or giving in payment, is the owner of the thing sold, exchanged, or given. Rev. Civil Code, arts. 2475, 2501, 2569, 2667.

That a different rule should prevail in case of a settlement between debtor and creditor, where property wholly outside of the differences between the parties is given in payment, is neither in accordance with reason or the law, as I understand either. The defendant urges strongly as applicable here the view of the law taken by Justice Bradley in the case of *Chapman v. Wilson*, *ante*, page 30, some time since decided in this court. As I understand that case it was entirely different in its facts from this. Warranty was expressly waived in regard to the thing given in payment; and the invalid thing, the subject of contest, was a worthless collateral security. The case of *Davis v. Lee*, 20 La. An., 248, also cited, was a genuine case of transaction and compromise. The syllabus shows how little it bears on this case.

"When several parties having interest in an estate enter into a transaction, the object of which is to end litigation and settle all matters in dispute, none of the parties are bound in warranty to the others on account of the interest in real property therein conveyed."

The case of *Wright v. Temple*, 13 La. An., 413, appears to be a parallel case to this, and there it was held that "a transfer of an obligation of a third person in part payment or acquittance of a debt, the amount of which is ascertained by a settlement, is not a compromise but a *dation en paiement*."

The verdict of the jury is against the law, and I am constrained to grant a new trial. In charging the jury I was particularly careful to inform them that, in order to find for

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the defendant on the theory of compromise or transaction, they must find from the evidence that warranty of ownership must have been expressly waived or that the title or ownership of the bonds was one of the differences compromised. The jury may not have understood this instruction; if they did and followed it, then their verdict is wholly unsupported by the evidence in the case, and a new trial should be granted on that ground.

In granting a new trial I do not want to be considered as holding that in the transfer of the bonds in this case there was any other warranty by Copes & Phelps than that of ownership or the right to transfer. And this leads me to say that perhaps the stipulated price at which they were taken in payment may not be the true rule in damages in this case. If the collectibility of the bonds was not warranted, it would seem more equitable to require from Copes & Phelps the value they would have had if genuine; in other words, what plaintiff's firm would have realized in the foreclosure of the mortgage securing the bonds, if the bonds had been genuine, as both parties supposed. The hardship of the case leads me to say that now transaction or compromise is the most appropriate remedy to apply to it. Let the verdict and judgment be set aside and a new trial ordered.

FITZPATRICK AND OTHERS v. DOMINGO.

The statutes of Louisiana, which require all claims against decedents' estates to be presented to the mortuary court, operate only on the state courts, and do not prevent the revivor against the personal representative of a deceased defendant of a suit brought in the circuit court of the United States.

Heard on demurrer to bill of revivor.

Messrs. Albert Goldthwaite and A. Micou, for complainant.

Mr. Chas. H. Lavillebeuvre, for defendant.

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BILLINGS, District Judge. The cause is submitted on demurrer to a bill of revivor. The original bill was filed to obtain an accounting from respondent Jose Domingo in behalf of the next of kin of his deceased wife as to her estate. The bill of revivor sets out the original bill, the pendency and progress of the suit, the death of the original respondent, the probate of his last will, the appointment and qualification of the executor, and then prays for a revival of the suit against the estate of Domingo, by bringing in the executor. It is not questioned that the cause of the action originally commenced against Domingo survives against his estate; but the point is urged that under the laws of Louisiana, in the courts of the state of Louisiana, all claims against the estates of decedents must be presented in the mortuary court. But the question here is one of federal jurisdiction, to be determined by the statutes of the United States, and the provisions of "these statutes are," as Judge Conkling in his treatise, page 469, remarks, "very ample."

The judiciary act (1 Stat., p. 90, sec. 31) provides that in case the cause of action survives, and either party dies, the court before whom such cause may be depending is empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require, and that such executor or administrator may be brought in by process, and the court may render judgment in the same manner as if he had appeared voluntarily.

In *Clarke v. Mathewson*, 12 Pet., 164, a bill had been filed by Wetmore, who subsequently died. Clarke was appointed administrator, and filed a bill of revivor. Both the administrator and the respondent were citizens of Rhode Island. The court held that both upon the settled rules of equity jurisprudence and under the statute above referred to, "the revivor of a suit in equity by or against the representative of a deceased party was a matter of right and a mere continuation of the original suit." Rule 56 in equity is declarative not only of the practice of the court, but of provisions

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of the statute. The statute of Louisiana, in this respect, operates only upon her own courts, and cannot deprive this court of a jurisdiction already vested and expressly continued by an act of congress.

The demurrer is therefore overruled, with leave to answer by the next rule-day.

HART V. THE CITY OF NEW ORLEANS.

An affidavit for the removal of a suit under the third clause of section 689, Revised Statutes, which is made by the attorney of the party, and which states that the party "has reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice" in the state court, and that the party is absent, for which reason the affidavit is made by the attorney, is sufficient.

Heard on motion to remand the cause to the state court.

Mr. Charles F. Buck, City Attorney, for the motion.

Messrs. A. G. Brice and E. H. Farrar, contra.

BILLINGS, District Judge. The cause is submitted on a motion to remand, the question being whether, under the local-prejudice act of 1867 (14 Stat., 558), the affidavit may be made by the attorney of record. The affidavit is in the form prescribed by the statute, that *the plaintiff*, who is a citizen of the state of New York, "has reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice." The affidavit sets out the absence of the plaintiff as the reason why the affidavit is not made in person by him, and the hardship which will result from the times of the recurrence of the terms of the United States circuit court, whereby a long delay will be necessitated in the progress of the cause, and is accompanied by a petition of the plaintiff, through his attorney, for a removal.

The question is whether this affidavit is an affidavit *made* by the plaintiff, within the meaning of the statute. I think

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the object and history of the statute show that it is. Under the act of 1789 an alien or citizen of another state must be a defendant, and must be sued alone in order to be entitled to remove. The act of 1866 (14 Stat., 306) provided that a defendant, who was an alien or foreign citizen, might remove his cause even when he was sued with others, and the purpose of the suit was to enjoin him, or when his controversy was severable from that of the other defendants. This act of 1867 (14 Stat., 558) is declared to be amendatory of the last, and permits any foreign citizen, be he plaintiff or defendant, who has a suit pending with a resident citizen in the courts of the state of the latter, to remove the cause upon making and filing the affidavit. The object of the statute was, in cases which, according to the federal constitution, were embraced within the judicial power of the Union, to give any foreign citizen the right peremptorily to elect to have his cause tried in the courts of the Union, if he exhibited to the court proof by affidavit that he feared he could not obtain justice by reason of local prejudice. The allegation of local prejudice cannot be traversed, and need not specify any grounds. When made and exhibited to the court in the form of an affidavit, it works absolutely and arbitrarily a removal. The election of the party to remove, and the statement of his fear and belief, verified by the oath of some person who reasonably knows the same, are, it seems to me, the sole requisites imposed by congress. To require more would restrict unreasonably the protection afforded by the law. The affidavit in behalf of a party in his absence, made by the attorney, as to a fact which the attorney might and almost necessarily must know, affords to the opposite party even a better security than that of the client could, and is the affidavit made by the party, within the meaning of the statute.

The motion to remand is denied.

Thomas v. Parish of Tensas.

THOMAS V. THE POLICE JURY OF TENSAS PARISH.

1. A citizen of another state brought suit in the United States circuit court of Louisiana, and died; his widow was appointed administratrix in the state of his domicile, and was recognized in Louisiana as tutrix of his minor children. *Held*, that the suit could be revived and prosecuted in her name without her taking out letters of administration in Louisiana.
2. The natural tutrix of minor children is, under the law of Louisiana, vested with authority to administer the succession of their deceased parent.

Heard upon motion to vacate order reviving suit.

Messrs. Thomas J. Semmes and E. H. Farrar, for plaintiff.

Messrs. E. T. Merrick, W. H. Foster and E. T. Merrick, Jr., for defendant.

BILLINGS, District Judge. After the commencement of this suit the plaintiff died. He was at the time of the institution of the suit, as well as at the time of his death, a citizen of the state of Mississippi. Upon the suggestion of his death an order was entered that the suit be revived, and that Mrs. Virginia Thomas, widow of former plaintiff, have leave to prosecute the same as administratrix of his estate and as natural tutrix of her minor children. This hearing is upon a motion to vacate that order as having been improperly entered.

The facts which appeared upon the hearing were as follows: The death of B. R. Thomas; that he was domiciled in Mississippi; the appointment there of Mrs. Virginia Thomas as administratrix of his estate; and her recognition in this state as natural tutrix of the minor children.

My conclusion is upon these facts that she may continue this suit.

It has never been decided that under the statute (1 Stat. p. 90, § 31; Rev. Stat., sec. 955) it was necessary for the administratrix, in order to revive a suit, to take out letters within the state where the cause was pending. The court is already seized of jurisdiction, and the question would be

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whether the effect of the statute is not that the suit descends to the representative of the deceased party, be he heir or executor or administrator, as the case may be, in such a way that the only proof necessary is of the death and of that relation.

But it is not necessary to consider that question in this case, for, if we concede that it would be necessary to hold that the proof of administration must be the same to entitle a party to revive as to commence a suit, such an administration is established. The natural tutrix of the minor children is, under our law, clothed with the authority to administer the succession of the estate of the deceased parent.

In *Bryan v. Atcheson*, 2 La. An., 462, the court says it is immaterial whether the property of a succession, in theory, vests partly in creditors or wholly in heirs; that the tutor of minor heirs may, as such tutor, administer the succession and may bring suit. Whether she has omitted to give bond, or whether there are major heirs, is matter to be established by proof, and until so established will not be assumed. So, the objection that the assumption of domicile in this state was pretended cannot be heard in this forum. Whatever ground it might furnish for a revocation of the appointment in the court appointing, it cannot be listened to here. See, also, *Labranche v. Trapagnier*, 4 La. An., 558; *Hair v. McDade*, 10 La. An., 534. In *Ventriss v. Smith*, 10 Pet., 161, the person conducting the suit was only a non-resident administrator, appointed *ad collegendum*; and even there the court held the authority sufficient.

It is also urged that under the Mississippi law of inheritance the widow inherits the portion of a child. This is true, but it is also true that the choses in action vest in the administrator or executor; therefore the right possibly to receive a portion of the fruits of the administration would not affect the right of Mrs. Thomas to maintain such a suit there as administratrix and here as tutrix. The exception is overruled, and the motion to vacate the order is refused.

Louisiana Lottery Co. v. Clark.

LOUISIANA STATE LOTTERY COMPANY v. CLARK AND SILVERMAN.

A complainant who in a proper case files a bill of interpleader against two defendants both claiming a fund in the complainant's custody, on which a decree is made by the court by which the rights of the defendants are settled, is entitled to be paid out of the fund reasonable counsel fees for bringing the bill.

(Before PARDEE and BILLINGS, JJ.)

IN EQUITY. Heard upon petition for rehearing.

The facts were as follows: Two persons, Silverman and Clark, each claiming to have drawn a prize in the lottery of the Louisiana State Lottery Company on the same ticket, brought separate suits against the lottery company to recover the amount of the prize. Thereupon the lottery company filed against them a bill of interpleader, in which it admitted that the ticket had drawn a prize; admitted that the company was liable to pay the same to the lawful holder of the ticket; averring that it been unable to decide which of the two was the lawful holder, and praying that the defendants might be required to litigate their rights in that suit.

After some costs had been made in the interpleader suit, Silverman and Clark compromised their conflicting claims, and thereupon the court made a decree requiring the lottery company to pay the prize money to the claimants, but first deducting therefrom counsel fees for filing the bill of interpleader. The defendants thereupon filed a petition praying for a rehearing of so much of the decree as allowed counsel fees to the complainant.

Messrs. D. C. Labatt, L. L. Labatt and H. C. Miller, for the petition.

Messrs. J. D. Rouse and Wm. Grant, contra.

PARDEE, Circuit Judge. When two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears that he may be hurt by some of them, he may

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exhibit a bill of interpleader against them." Daniel's Ch. Pr., 1560; Story's Eq. Pl., 806.

The bill of interpleader, then, was properly filed in this case.

"The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other charges and expenses as between solicitor and client; nor the power of a court of equity in cases of administration of funds under its control to make such allowance to the parties out of the fund as justice and equity may require. And the act contains nothing which can be fairly construed to deprive the court of chancery of its long-established control over the costs and charges of the litigation to be exercised, as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of the general fund." *Trustees v. Greenough*, 105 U. S., 527, 536. In that case it is further declared that in litigation upon railroad mortgages, where funds have been subject to the control of the court, "it has been the practice, as well in courts of the United States as in those of the states, to make fair and just allowance for expenses and counsel fees to the trustees, or other parties promoting the litigation, and securing the due application of the property to the trusts and charges to which it was subject;" and that "such allowances, if made with moderation and a jealous regard to the rights of those interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

In the case before us a mere stakeholder, without fault himself, in possession of a fund claimed entire by contending parties (but, as the result shows, with equal rights and claims thereto), brings the same into court, thereby promoting the litigation and securing the due application of the property. From the nature of the contending claims and the circumstances of the case he incurs expense and counsel fees in bringing the fund into court. There is no equity in compelling him to bear these charges. On the contrary, the

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parties who have benefited thereby should bear them. And this we understand to be in accord with the principles laid down in the case of *Trustees v. Greenough*, *supra*, which are merely declaratory of the general rules controlling courts of equity in cases like this. As to the moderation of the allowance made by the chancellor, no showing is made here; the only point decided at this time being as to the authority to allow any fee. We see no reason to disturb the order heretofore made in this case, and the rehearing will be denied.

BILLINGS, District Judge, concurred.

STACKHOUSE V. ZUNTS.

1. Where a suit was brought in a state court to enjoin an execution on the ground that the judgment had been obtained by fraud, *held*, that it was not a suit merely incidental to the action in which the judgment was rendered, but a new case, which, the parties being citizens of different states, was removable to a court of the United States.
2. If a suit is rightfully removed from a state court to a court of the United States, the latter has jurisdiction to grant any relief the case may demand, as fully as the state court could have done had the case not been removed.

Heard on motion to remand to state court.

Messrs. E. E. White, H. B. Magruder and F. L. Richardson, for complainant.

Messrs. A. C. Lewis and T. M. Gill, for defendant.

PARDEE, Circuit Judge. This case comes up on a motion to remand to the state court, where it was instituted, on the ground:

"That this court has no jurisdiction of a suit seeking to enjoin the execution of a judgment rendered by a state court, neither to pass upon, dissolve nor perpetuate such an injunction granted by a state court, and more especially where the

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complainant or plaintiff obtaining said injunction is now, and was at the time of the rendition of the judgment enjoined or sought to be enjoined, a citizen of this state, and within the jurisdiction of said state court."

The transcript shows that the suit was instituted by filing in the state court a petition of the following substance:

"The petition of Herbert W. Stackhouse, a resident of the parish of Plaquemines, respectfully shows that James E. Zunts, a resident of Harrison county, and a citizen of the state of Mississippi, claiming and pretending to be the subrogee of one Ruggles S. Morse, a citizen of Maine, resident in the city of Portland, has caused to be issued out of this honorable court two writs of *feri facias* in the suits entitled *R. S. Morse, James E. Zunts, subrogated, v. Herbert W. Stackhouse*, and numbered 371 and 372 of the docket of this honorable court; and under said writs the sheriff of the parish of Plaquemines has seized, advertised for sale, and will sell, on the 1st day of April, 1882, the following described property, to wit."

Then follows a description of the property and advertisement.

"Unless restrained by the order and injunction of this court."

Then follow matters set out at great length, called reasons, summarized by the pleader as follows:

"As grounds for injunction, petitioner, therefore, alleges compensation, error of fact and of law, the nullity of the judgments sought to be enforced."

The errors of fact and of law, as set forth in the petition, constitute a case of constructive, if not actual, fraud. And the compensation of the judgments, as pleaded, amounts to about the same charge. The relief sought is an injunction restraining the sale of the property said to have been seized and advertised, and for general relief. That the case, as made by the record, shows "a controversy between citizens of different states;" and "a controversy which is wholly between citizens of different states, and which can be fully

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determined as between them," cannot be disputed with any show of reason. And if it is such a controversy, then the suit was removable to this court.

If a case is properly removable, and is properly removed, to this court, then, as we have had occasion to hold several times, this court is vested with the jurisdiction to grant any proper relief the case may demand, to as full an extent as the state court could have granted had the case not been removed. And it seems clear that the supreme court have so settled the law. See *Gaines v. Fuentes*, 92 U. S., 10.

"A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall., 203.

The point is urged in argument that the proceedings, removed to this court, are merely incidental and auxiliary to the original action in the state court, and so within the decisions in *Bank v. Turnbull*, 16 Wall., 190, and *Barrow v. Hunton*, 99 U. S., 80; but the petition in the case does not make such a showing. The proceeding, instituted and removed, is not only "tantamount to a bill in equity to set aside a decree for fraud in obtaining it," but really amounts to "a new case arising on new facts, although having relation to the validity of a judgment." The case of *Barrow v. Hunton*, *supra*, fully supports the right to remove in this case. The case of *Bondurant v. Watson*, 103 U. S., 281, cited by counsel for defendant, does not conflict with the conclusions here reached; it is in full accord, and it seems to me would be conclusive authority for this court to retain and hear this cause if the court had any doubt in the case.

The motion to remand is denied with costs.

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LAOEOIX FILS v. SARBAZIN.

The courts of the United States take judicial notice of the public treaties between the United States and foreign countries.

IN EQUITY. Heard upon demurrer to the bill.

Mr. R. King Cutler, for complainants.

Mr. Andrew J. Murphy, for defendants.

PARDEE, Circuit Judge. This court takes judicial notice of the public treaties between the United States and foreign countries. Where a citizen of France has, in compliance with the trade-mark laws of the United States, duly registered a trade-mark, he need not, in bringing an action against a citizen of Louisiana for violation of his rights in such trade-mark, allege that there is in force a treaty between the United States and France affording privileges in France to citizens of the United States similar to those given by the trade-mark laws of the United States.

Let demurrer be overruled.

UNITED STATES v. ANTZ.

1. A writ of *venire facias* is, under the statutes of the United States, indispensable to the summoning of a legal grand jury.
2. A paper writing purporting to be a writ of *venire facias*, which is directed to the marshal of the United States for the district of Louisiana, there being no such officer or district, and which is *tested* in the name of the deputy clerk of the court, and not in the name of the chief justice of the supreme court, is not a writ of *venire facias* or any process in the nature of that writ.

Heard upon motion to quash the indictment.

Messrs. Albert H. Leonard, United States Attorney, and *Charles E. Woods*, Assistant United States Attorney, for the United States.

Messrs. J. D. Rouse, Wm. Grant and *J. Ward Gurley, Jr.*, for defendant.

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BILLINGS, District Judge. A motion is made to quash an indictment on the ground that no *venire facias* issued for the summoning of the grand jury which found the same.

The rules of the circuit court on the subject of drawing and summoning the grand and petit jurors are as follows:

Rules with reference to the drawing of jurors, adopted November 13, 1879:

In order that the practice of the court may conform to the provisions of the act of the congress relating to jurors in the courts of the United States, the following rules are adopted, and are designated as "Rules with reference to the drawing of jurors," in place of rules 29, 30 and 31, which are hereby repealed:

(1) The marshal shall provide a jury-box having two separate locks with dissimilar keys, one of which shall be kept by the clerk and the other by the commissioner. The clerk shall have the custody of the box, and it shall not be opened except in the presence of the court, by both the clerk and commissioner, when names for a jury are being drawn therefrom or placed therein in pursuance of the orders of the court, or when it shall be ordered to be emptied by order of the court in pursuance of these rules.

(2) A person having the qualifications required by law shall, at each term of the court, be appointed jury commissioner for the term; provided, that the fact that any person has served as commissioner shall not render him ineligible for reappointment; and provided further, that the court may, in its discretion, remove the commissioner and appoint another person to act in his place.

(3) Whenever a jury-list shall be ordered, the jury commissioner and the clerk shall alternately, and in accordance with the provisions of the law, place in the jury-box such number of names as may be directed by the court of persons having the necessary qualifications of jurors, which names shall be written on ballots of uniform size and on similar paper. The list of names identified by the signatures of both officers shall be filed in the clerk's office.


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Whenever a drawing of jurors is necessary, and the number of names in the box has been reduced below three hundred, the list shall be supplemented or the box emptied, and a new list prepared as the court may direct.

(4) Whenever a *venire*, original or according to the provisions of the law, supplemental, either for grand or petit jurors, shall be ordered, the requisite number of names shall be drawn in open court by the marshal, who shall proclaim in an audible voice each name as it is drawn, and the clerk shall forthwith enter the same upon the *venire*.

(5) It shall be the duty of the jury commissioner to attend at every drawing of jurors, either under an original or supplemental *venire*, and his presence shall be noticed in the minutes of the court.

(6) Upon the appointment of a jury commissioner it shall be the duty of the clerk to furnish him with a copy of these rules, with a clear reference to the statutes relating to the qualifications, the limitations upon disqualifications, and the drawing of jurors.

The records of the court show that these rules were strictly complied with as to the drawing of the grand jury, and that the following order was issued for summoning the same: 

Order to draw petit and grand jurors, entered November 9, 1882:

It is ordered by the court that the marshal do, on Saturday next, the 11th day of November, instant, draw from the jury-box, in manner prescribed by law and the rules of court, the names of forty-eight persons to serve as petit jurors, and the names of twenty-three persons to serve as grand jurors, during the November term, A. D. 1882, of this court, and that a *venire* for said jurors issue in due form, returnable, as to the petit jurors, on Monday, the 13th instant, and as to the grand jurors, on Wednesday, 15th, at 11 o'clock A. M.

Further, it is ordered that the jury commissioner be notified to be present at the drawing of said *venire*.

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The paper which actually issued from the clerk's office was as follows:

"VENIRE FOR TWENTY-THREE GRAND JURORS, ISSUED NOVEMBER 11, 1882.

"The President of the United States, to the Marshal of the United States for the District of Louisiana, Greeting:

"You are hereby commanded to summon the following-named good and lawful men, to be and appear before the United States circuit court, fifth judicial circuit, and eastern district of Louisiana, at the city of New Orleans, on Wednesday, the 15th day of November, 1882, at 11 o'clock A. M., then and there to serve as grand jurors during the November term, 1882, thereof, viz.: [Here follow the names of twenty-three persons.]

"And herein fail not at your peril.

"Witness my hand and seal of said court, at the city of New Orleans, this 11th day of November, 1882.

"T. V. COUPLAND, Deputy Clerk."

The records of the court also show that upon the day fixed for the appearance of the jurors, and upon the adjourned day, seventeen persons out of a list of twenty-three appeared, and were sworn and impaneled as a grand jury, and that by this body so organized this indictment was found.

The first question is: What was the character of the paper delivered to the marshal from the clerk's office? It was certainly irregular in that it was addressed to the "marshal of the district of Louisiana," when there was no such officer, and when the title of the executive officer of this court is the "marshal of the eastern district of Louisiana." But a graver defect is in the testing. It is observed this paper is tested in the name of the deputy clerk. The statute of congress — act of May, 1792 (1 St. at Large, p. 295, § 1; Rev. St., § 911) — provides that all writs and processes issuing from a circuit court shall bear teste of the chief justice of the United States. This paper, then, was neither writ nor process. It was not addressed to any officer in ex-

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istence, and it lacked the teste which the law prescribes. It was not a writ of *venire facias*, nor any process in the nature of that writ.

The question is then presented to the court: Is a writ of *venire facias*, or a process in the nature of that writ, under the law, indispensably necessary for the bringing together a grand jury? Prior to the statute of 1846 the congress did not by name indicate what writ or process should be employed in procuring grand juries. In the acts of 1789 and 1793 the law provided that "the circuit courts shall have power to issue writs of *habeas corpus*, *scire facias*, and all writs not specifically provided for by statute which may be necessary for the exercise of their jurisdiction and agreeable to the usages and principles of law." 1 Stat., 81, 334; Rev. St., sec. 716. Congress, by these same early acts, granted to the circuit courts jurisdiction in the matter of the punishment of crimes and offenses which necessitated the action of grand juries; so that the exercise of the jurisdiction of the circuit courts made necessary process for calling together grand juries; and since the process for that purpose which was "agreeable to the usages and principles of law" was the writ of *venire facias*, these courts were invested with power to issue that writ. *United States v. Hill*, 1 Brock., 156. The twenty-ninth section of the act of 1789 (1 Stat., 88; Rev. St., sec. 803) provided that "writs of *venire facias*, when directed by the court, should issue from the clerk's office, *i. e.*, in vacation, when they had been ordered by the court, and made strict provision for their service and return.

Although the writ which was to be used by the courts of the United States for summoning the juries was denominated in the statute a *venire facias*, and in its general features was that writ, it was not precisely that. The writ of *venire facias* was the process used to summon in a jury after issue joined, and when a trial was to be had in a particular cause, and was confined to that cause. Hence it was that the challenge to the array was limited to the interest or

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favor of the officer who summoned. The writ used throughout all the states of the Union for the summoning of petit juries, though known as the *venire facias*, was more precisely the "general previous precept, by virtue of which the sheriff returned into the courts of jail delivery divers several panels, and returned and delivered in one or more of those panels from time to time as the court needed and called for any." *Peter Cook's Case*, 13 How. St. Tr., 327; *People v. McKay*, 18 Johns., 212.

Since at the common law the writ in the nature of *venire facias* was used for no other purpose than to convene grand and petit juries, it is manifest that the congress by authorizing its issuance meant to include it as the writ for juries, under the grant to the courts of "power to issue all writs necessary for the exercise of their respective jurisdictions." If the congress had stopped here the question would have been whether, there being a grant of power to issue all writs necessary for the exercise of their jurisdictions which were agreeable to the usages and principles of law, as well as a jurisdiction which for its exercise rendered grand juries necessary, namely, a jurisdiction in criminal causes, and the ancient and invariable writ according to the usages and principles of law being the *venire*, the courts of the United States must not employ that writ, or a process in the nature of that writ, in the exercise of their criminal jurisdiction. I say if congress had stopped here, the question would have been how far the acts of congress had made the usage of the common law the exclusive guide or rule for convening grand juries.

But congress has not yet stopped here. By the act of 1846 (9 Stat., p. 72, sec. 3; Rev. Stat., sec. 810) congress enacted:

"That no grand jury shall be summoned to attend any circuit or district court unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a *venire* to issue therefor, and

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either of said courts may in term order a grand jury to be summoned at such time and to serve such time as it may direct, whenever in its judgment it may be proper to do so."

I am aware that the immediate purpose of this last provision was to do away with the invariable presence of a grand jury at every term of a circuit or district court, and to leave it discretionary with the judges whether and when such a body should be convened; but I think the fair meaning of the enactment is that congress either makes it, or recognizes it as already being, a rigid, unyielding requirement of the law that no grand jury shall be summoned unless a *venire facias* has therefor issued, if in the vacation, by order of one of the judges, or, if in term time, by order of the court. This is the view of Mr. Justice Nelson in *United States v. Reed*, 2 Blatch., 435, 451.

At the common law, juries, grand or petit, could be summoned only through the usual precept, except only in case of a jury *medietate linguae*,—*i. e.*, where an accused person spoke a foreign language, and, this being made known to the court, a petit jury was immediately and without the ordinary precept awarded, one-half of the jurors speaking English and one-half the alien's language. 1 Chit. Cr. Law, 508, 509; Hawkins, P. C., book 2, c. 41, § 1; 2 Hale, P. C., 260, 261; *Peter Cook's Case*, 13 How. St. Tr., 327.

Where, by reason of the silence of the statutes, the common-law requirement has been operative, or where the statute has expressly required a *venire* for the summoning of a grand jury, the weight of authority is against the power of courts to dispense with the writ. *People v. McKay*, 18 Johns., 212; *Clinton v. Englebrecht*, 13 Wall., 434; *State v. Dozier*, 2 Speers, 211; *State v. Williams*, 1 Rich. (S. C.), 188. The case of *Bird v. Georgia*, 14 Ga., 43, holds directly the contrary, but the court frankly state that their conclusion is in conflict with American authority. But the counsel for the United States have pressed the argument that since the passage of the act of 1879 (21 Stat., 43) the writ of *venire facias* as a means of obtaining a grand jury would be a

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useless and vain process, and therefore may be regarded as no longer a legal prerequisite. The provisions of that statute are as follows:

“And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualification prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal party in the district in which the court is held opposing that to which the clerk may belong; the clerk and commissioner each to place one name in said box alternately without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state.”

This statute repeals the last clause of section 800, and the entire sections 801, 820 and 821. The last clause of section 800 and the entire section 801 contained special provision for the drawing of jurors in Pennsylvania, and sections 820 and 821 established as grounds of additional challenges the having participated in the rebellion. The Revised Statutes had compiled and re-enacted all the acts above referred to with reference to juries, including the act of 1846, which prohibited the summoning of a grand jury unless a *venire* had been ordered, and the provision of the act of 1789, which allowed that writ to issue from the clerk's office, and directed the manner of its service and return. In short, the portions of the statute repealed and those left in force seem to show on the part of congress not alone a purpose to leave unrepealed all the provisions relating to the *venire facias*, but the

determination to make that purpose unmistakable. It meant to change and did change the manner of designating the names of persons who were to constitute the jurors; it meant to leave and did leave the manner of summoning the jurors to be accomplished by the *venire facias*; it meant to leave and did leave the manner of impaneling the jurors to the rules of the courts, which were to be modeled *in substance* after the state statutes from time to time in force. That act, it is to be observed, has required the United States courts to order the selection of the list of the grand or petit jurors to serve in the United States courts either by lot from the names selected by the jury commissioners to be appointed by the court, and the clerk of the court, or from the box from which the jurors to serve in the courts of this state are drawn. If the latter method were adopted, the *venire*, or a process in the nature of a *venire*, would be as necessary as ever, and the statute could hardly be held to have impliedly repealed a preceding one by establishing a method in the alternative, when if one of the alternative plans should be selected, it must be conceded, the need of the process should remain undiminished.

But even where, as in this case, the jurors are drawn from the number of those compiled by the commissioner and clerk, it seems to me the necessity for the *venire* continues. True, this court, in order to secure the utmost fairness, has gone beyond the requirements of the act of 1879, and by its rules requires that the drawing of the names shall be not only "publicly had," but shall be had in *open court*, and that each name, as drawn, shall be called aloud by the marshal and entered of record by the clerk upon the minutes of the court. But this does not dispense with a process upon which shall be a lawful return. The common law *venire* commanded the sheriff to *cause to come* a certain number of jurors. This command included: *First*, the selection of the names, which was left to the sheriff's discretion, from the body of the county, from the class of men who were by law qualified; *secondly*, the summoning of the persons thus se-

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lected; and *thirdly*, a return of the writ, with his doings under it, whereby "he returned and delivered in" the jury to the court. Unless there be a return and a delivery in by the officer, there would be no record showing the identity of the persons appearing with the persons drawn. To my mind, the necessity of a return is increased rather than diminished by the act of 1879. That act is intended to exclude, so far as is possible, political bias in the formation of juries. To accomplish this, under checks and safeguards which the statutes deemed adequate, a clerk and a commissioner of antagonistic political views are to select the names, and are directed even in the order in which they are to place the names in the box, for they are required to deposit each a name *alternately*. Now if, after all this has been done with such absolutely equal share of action, in order that there may be a correspondingly fair result, is it possible that the statute intended to deprive the court of all means of securing a service, and "delivering in" which should be equally impartial? Of what avail the nice equipoise of party affiliation in the drawing if all might be defeated by the manner of summoning?

It seems to me that, if we must resort to inference, it is palpable that congress must have intended that a drawing so completely fair should be supplemented and made effective in the proceedings of the courts by a service which should be equally incapable of perversion, and which could be scrutinized by the public, and dealt with and severely enforced by the court. Such a service could be secured only by a return, which should be made under the penalties which are affixed to the official certificates of what has been done under judicial processes. Take the case of this very grand jury. Twenty-three names were drawn. Including those who appeared on the return and the adjourned return-day, seventeen presented themselves as grand jurors. In this case there were six absentees. In other cases there might be a far greater proportion absent. Without a return and a delivering in political bias might still determine who should be summoned and who should be omitted in the service, and

the whole purpose of the enactment of the last statute might be frustrated. The most impartial drawing can be made with certainty to result in an unbiased array of actually attending jurors only by means of process and return.

I think the necessity of the process, in order to effectuate the object of the statute, is clear. But if it were not, the statute itself being clear, implicit compliance with it would be equally obligatory. I think this follows from fundamental principles, which have become concentrated alike for what they have cost humanity and what they are worth to humanity. These principles are that laws tending to secure unprejudiced grand jurors must be considered as having been enacted, in part, for the protection of and as being the source of rights, to those accused of crimes, which are the subjects of indictment or presentment; that under all just governments, whatever the law-making power has established as a prerequisite for the ascertainment of guilt or innocence, cannot be abated one jot or tittle by those who sit to administer the law; that in criminal procedure, matters of form clearly prescribed by law must be held by courts to be matters of substance, for the reason alone that they have been prescribed and independent of any perceived utility; that especially is this true where laws are enacted and courts established under a constitution which provides that "no person shall be deprived of life, liberty or property without due process of law."

I think the rule No. 32 of this court shows that the objection is seasonably taken. That rule provides that "no challenge to the array or exception to the *validity of any grand jury* shall be entertained unless made at or prior to the arraignment of the accused." The arraignment includes the bringing the accused before the bar of the court, the reading to him the indictment, and entering his plea. At the common law a challenge to the array seems to have included only exceptions to the panel on account of interest or favor on the part of the person who summoned the jury. The objection here made is an exception to the array in the

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nature of a challenge, and falls within the rule, as it is an "exception to the validity of the grand jury." This rule extends the opportunity for raising this objection possibly beyond the time allowed by the laws of this state. But the statute of the congress requires the courts of the United States, "by rules or order, to conform the impaneling of jurors, *in substance*, to the laws and usages relating to the state courts from time to time in force in the state." The state statute is not adopted,—that is, the conformity is not wrought, *ipso facto*, by the existence of the state statute or state usage, but is effected by the action of the court through its rule or order; and the conformity need not be exact, but need be merely substantial. This thirty-second rule is therefore a sufficient compliance with the statute, and controls the matter of the time when this objection may be interposed.

The motion to quash the indictment must prevail.

UNITED STATES v. RONDEAU.

A plea to an indictment which alleged that when the names of the grand jurors by whom the indictment was found were drawn from the jury-box, it contained the names of three hundred and three persons only, and that of these three were disqualified and three were dead, is insufficient and bad.

Heard on demurrer to special plea to indictment.

Messrs. Albert H. Leonard, United States Attorney, and *Charles E. Woods*, Assistant United States Attorney, for the United States.

Messrs. John D. Rouse, *Wm. Grant* and *J. Ward Gurley, Jr.*, for defendant.

BILLINGS, District Judge. This matter is submitted on the demurrer to pleas to an indictment. The substance of the pleas is that there was default in the manner of drawing

the grand jury which found this indictment, in this: that there were, at the time of the drawing, the names of but three hundred and three persons in the box; that of those persons, three were ineligible and three were dead. There can be no question but that the objection is properly presented to the court by a plea in abatement. The clerk and commissioner stand in place of the sheriff, so far as his functions have been transferred to them, and if their acts in preparing the list of jurors or placing them in the box have been characterized by "default or favor," the fact may be brought to the attention of the court by this plea. The question is as to the sufficiency of plea. It is to be observed the pleas admit that the grand jury which was actually impaneled, and which found the indictment, was composed of eligible persons; that three persons, dead at the time of drawing, were living at the opening of this term, the time the list was prepared, and impartiality or indifference of the commissioner and clerk who prepared the list. The point urged is, that at the time of each drawing the statute has imperatively required that there shall be in the box from which jurors are drawn at least three hundred names of living, eligible persons.

The correctness of the position of defendants' counsel depends upon the meaning of the statute. The statute provides that "all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box, containing at the time of each drawing the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes of the United States, which names shall have been placed there by the clerk of such court and a commissioner," etc. I give the argument pressed by the counsel for defense, springing from the use of negative words, its full effect. I understand the law to be in many cases, that, as to the thing negatived, the law is imperative. The statute says not less than three hundred. The thing negatived is the number of names. If less than that number of names had been in the

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box at the time of the drawing, the statute would have been violated; but the precise question here is as to the qualifications, which is a different thing from the number of persons. The question is, whether the statute means absolutely at least three hundred names of persons whom the commissioners, without favor or default, certify have the requisite qualifications, or absolutely at least three hundred names of persons who shall absolutely have the requisite qualifications. After giving the fair effect to the law of construction as to negative words, the real question remains, did the legislature, in what they said about qualification, mean, so far as relates to the commissioners, to establish a guide which should be impartially, and to the extent of the opportunities, followed, or an inflexible prerequisite?

Does this statute mean that there must be three hundred names in the box of qualified persons as a condition of any valid drawing of any jurors therefrom? If this was the meaning of congress it would involve the duty on the part of the commissioners of determining in some reliable manner the question of eligibility, and would have rendered it necessary for the legislature to proceed further and to grant them authority and process for hearing and determining the matter in a *quasi* judicial manner; but they are not triers, nor have they the power to appoint triers. I do not think this the meaning of the statute. The great intent was to secure juries free from political bias through a commission in which the representation and action of the opposite political parties should be equal. Beyond this, and so far as relates to this particular provision, the purpose of the statute was (1) by requiring at least three hundred names, selected by the commissioner and clerk, to be always in the box, one-half to be selected by each officer, to require so large a number as to compel them to go out of their circle of personal friends and out of any particular circle of people, and thereby secure a selection, to a large extent at last, from the body of the district; (2) to require the commissioner and clerk to select, as far as they reasonably could, without process or any means

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of obtaining testimony, only those persons who have the qualifications requisite; and (3) to make at the time of impaneling or constituting a person a part of a particular jury, the rules as to the prescribed qualifications settled down upon him. Indeed, the duty imposed by this statute upon the clerk and commissioner is precisely that which the law formerly devolved upon the sheriff. Under his precept he was to summon only "good and lawful men," and a fixed number of men so qualified. As with the sheriff so with the clerk and commissioner, if incapacitated persons are selected, and if the error was purposely committed, the array might be challenged for this error and default; but if, as is virtually admitted by the plea, the error was inadvertently made, the name of an unqualified juror in the box or the presence of an unqualified person among the jurors presented, who was not impaneled, gives no ground for challenge to the array, but only to the individual juror.

I think the fact that this same statute authorizes the courts of the United States, in their discretion, to order their jurors to be drawn from the boxes of the state courts, where for the most part the testing of qualifications is left to the court at the time of the production and impaneling of the jurors, is a distinct ground for concluding that so far as this requirement touches the commissioner and clerk it was to be their guide, and not the absolute condition upon which the validity of their work depended.

I have spoken of the ineligible jurors only because if the number of those who were dead is deducted from the number of names in the box, there still remains the required number; but it should be said: if it could be ground of objection to the array that an eligible person had died after his name was placed in the jury-box, it would be a still stronger ground of objection that he had died after he had been drawn; and this has never been held to be ground of challenge.

The effect of death, in law, upon the jury-box is that which it is upon the body of the county; it is presumed to

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operate impartially; and a jury-list legally selected could not be rendered illegal because of the occurrence of death. The fairness which congress aimed at was such as "falls to the lot of humanity;" and in presumption of law a list would not be affected by the happening of an event which is the result of necessary laws, and which comes to all.

The demurrer to the plea is sustained, and the plea adjudged bad, and it is ordered that the prisoners plead to the indictment.

UNITED STATES V. BADER.

1. Congress has constitutional power to prohibit and punish the doing by officers of an election for representative in congress, of any act unauthorized by law, with intent to affect the election or its result.
2. An indictment under section 5515 of the Revised Statutes concluded *contra formam* the statute of the United States, and not also *contra formam* the statute of this state. *Held*, that the conclusion was proper and sufficient.
3. The fraudulent addition by the officers of an election for representative in congress, to an incomplete list of the voters required by law to be kept by them, of the names of persons not voting, with intent to affect said election, is an offense against section 5515 of the Revised Statutes.

The defendants were officers appointed by authority of the state of Louisiana, of an election held in the city of New Orleans, at which a representative in congress and other officers were to be elected. They were indicted under section 5515 of the United States Revised Statutes for doing an act unauthorized by law, with intent to affect said election and its result.

The defendants demurred to the indictment on grounds which are stated in the opinion of the court.

Messrs. Albert H. Leonard, United States Attorney, and *Charles E. Woods*, Assistant United States Attorney, for the government.

Messrs. J. D. Rouse, *Wm. Grant* and *J. Ward Gurley, Jr.*, for defendants.

BILLINGS, District Judge. The submission to the court is upon a demurrer to an indictment. Three grounds have been urged in support of the demurrer:

(1) That congress was without power to prohibit and follow with penal consequences the doing by the officers of election for members of congress of any act unauthorized, with the intent to affect any election or its result. The general doctrine that congress had authority to pass this statute, as a means of regulating and controlling the manner of electing members of congress, is settled by *Ex parte Siebold*, 100 U. S., 371, and *Ex parte Clarke*, id., 399.

The argument here is that a merely unauthorized act cannot be made a criminal one. That, for example, a mere presentation of argument by an officer of election to induce a voter to support or cast his vote for a particular candidate would be an offense under this clause of the statute. It undoubtedly would. The object of this clause undoubtedly was to prevent any interference in a political campaign in any manner not authorized on the part of the officers of election. The reason of the prohibition undoubtedly was to secure their impartiality by thus withdrawing them from participation in the election, with a view to influence its result, beyond the official or individual acts authorized. It stands upon precisely the same ground with the prohibition of the statute against the practicing of law on the part of judges. The act in itself is innocent. The act in connection with the office constitutes the guilt. Congress deemed, and it seems to me reasonably, that elections would be purer if the election officers were prohibited from participating therein beyond the acts specially allowed by law on their part. I think the meaning and object of the prohibition clear, and that the enactment in no manner transcends the power of congress.

(2) That the conclusion is *contra formam* the statute of the United States alone. But in this forum the sovereign whose laws have been violated is the government of the United States; the state officers and state laws on this sub-

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ject of election of members of congress, having been adopted by the United States, become *pro tanto* officers and laws of congress. It is as if a man, in giving a power of attorney to another, had adopted the phraseology, by reference simply, of some well known act. The second act is merely, as between the parties to the second, the act of the principal, and the reference to the first act is merely for designation. When the attorney was sued for not performing his duties under the power, nothing would be considered but a case where a power in the words of the adopted power had been given directly from the principal to the attorney. So here, although in the courts of the state the laws of the state would alone be regarded, in the courts of the United States it is the peace and dignity of the United States alone which is considered, and the conclusion is the proper one, that the entire offense is against the form of the federal statute.

(3) That the indictment is defective and does not comply with the settled rule of criminal pleadings; that the allegations must be express and nothing be left to inference. The charge is that the defendants were officers of an election held at a certain precinct in the city of New Orleans on the 7th day of November, A. D. 1882, for a member of congress, and that they, "being then and there officers of said election, with intent then and there to affect said election and its result," "did acts unauthorized in this: that they, being required to keep a list of the persons then and there voting, and to swear to said list as correct, did then and there add to said list." The point urged is that there should have been added the words, "which they then and there, as such officers as aforesaid, kept." That is, it is urged that here is a defect in that the list to which the fraudulent addition was made was one which "they were required by law to keep," and not one which they kept.

Admitting, for the sake of argument, that this analysis is correct, the question is, would it have been an offense for the accused to add to a list which had been begun, and which by law should have been kept (for the averment in the in-

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iron with wood and mats; that he was very particular about keeping the lots separate, because it was a small lot.

The first question to be decided is as to the liability of the consignees for the charge of trucking the iron across the wooden wharf. The contract specifies that the iron was to be taken from along-side. Unless this has a meaning outside of the plain signification of the words used, the expense of moving the iron over the wharf to land would fall on the consignees. They seek to avoid liability by showing that they could not take the iron until it was weighed, and that it "could not be weighed along-side the ship when it had been discharged." This, of course, goes for nothing as against the contract of the parties as to where the ship's carriage should cease.

The consignees also urge a custom of the port, as sworn to in these terms:

"The term 'taken from along-side,' in its general acceptance with merchants here, does not mean that the merchant is to take it from within a foot or two of the ship, but that the ship is to deliver on the earth-work, as is customary at this port."

The same witnesses say further:

"The term 'along-side' has ordinarily been construed here to mean delivery at this port; and as the custom house authorities require that the cargo shall be delivered on *terra firma*, and as the wharfmaster always insists that the wharf property cannot be jeopardized by the delivery of any heavy weights on the wood-work, the delivery on the earth-work has almost always been customary."

Again:

"According to the custom of this port, without presuming to say anything as to the law on the subject, it was the business of the ship to deliver that iron where the custom-house authorities designated."

Conceding such a custom as is described in the testimony of these witnesses to have been proved, it is sufficient to say that (a) it is not reasonable, for the customs authorities might

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designate a particular pair of scales, or a particular warehouse, for the government weighing; (b) custom cannot vary the terms of an unambiguous contract; (c) to allow such a custom to come in where the parties have specified that the cargo "is to be taken from along-side," would be to render nugatory such clause. Under the general law, in the absence of a special contract, the carrier could have been required to do no more than consignees claim in this case. See *The Tybee*, 1 Woods, 358; *Dibble v. Morgan*, id., 406; and cases cited in *Desty, Shipp.*, § 244.

The learned proctors for consignees rely upon the case of *The Delaware*, 14 Wall., 579, where it is said: "Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed in the particular trade to which the contract refers are used in a particular sense, and different from the sense which they ordinarily import;" but they should have read the next sentence: "Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain."

The contract in this case was that the consignees should take the iron "from along-side." That undoubtedly and plainly means that they were to take it from where the ordinary appliances of the ship would leave it in discharging,—“at the end of the ship's tackle,” on the wharf, if the ship was discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in the stream.

The next question is about the responsibility for short delivery. The bill of lading *supra* leaves no doubt as to the quantity of iron received. The government weigher's certificates leave no doubt as to the quantity of iron received by the consignees. There is no reason to suppose that the ship delivered more than the consignees received. No matter where the technical delivery took place, the actual delivery was on the earth-work. The ship undertook to put the iron there, did so, and has brought her bill for the expense. To assume that from the "end of the ship's tackle" to the earth-work some of the iron was lost, is a gratuitous assump-

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tion, wholly unsupported by the evidence. It is equally idle to suppose that while the iron was watched before weighing it was carried off. It seems to me much more probable that, in spite of the efforts of the chief officer to keep the three lots of iron aboard the Fifeshire separate, the said lots did get mixed, and that fourteen tons of the one hundred and seventeen lot were never delivered. The stipulation in the bill of lading, "holding himself and the said vessel bound to deliver the same weight of iron, provided it be weighed along-side at discharging," might have controlled the ship's liability had it been possible to have weighed the iron along-side. It was not possible to so weigh the iron, and therefore that cause became nugatory — the same as not written,— and the general liability of carriers for the non-delivery of freight attached.

Under the evidence there can be no doubt of the short delivery on the one hundred and seventeen tons of iron. Whether it was not all put aboard, whether it was lost on the voyage, whether it was all discharged, whether it was lost after discharging and before delivery on the earth-work, or whether the ship has some other valid excuse, it is incumbent on the ship's owners to show. Non-delivery of the goods shipped by a common carrier makes a *prima facie* case of liability against the carrier. This liability is not avoided by the evidence in this case.

The libelants should recover the balance due for freight, \$269.80, and the charges for trucking the iron, \$11.70, but from this amount should be deducted the agreed value of the iron not delivered, \$269.80, and this leaves a judgment for libelants of \$11.70 on the whole case. The libelants should pay the costs of this court, and the respondents those of the district court. So ordered.

A Raft of Timber.

A RAFT OF TIMBER.

1. A raft of timber afloat and in peril upon a public navigable water may be libeled in a court of admiralty for salvage services.
2. When the services of salvors conduce to the saving of the property imperiled, but would have been unavailing without other aid, and the salvage service is completed by other salvors, *held*, that the first set of salvors is entitled to compensation.

ADMIRALTY APPEAL.

Mr. R. King Cutler, for libelants.

Mr. E. Warren, for claimants.

PARDEE, Circuit Judge. On a very foggy morning in February, 1880, a large raft of logs broke loose in the upper part of the port of New Orleans. It was discovered by the steam-tug *Margaret*, a little steam ferry-boat then plying across the river from Louisiana avenue, in the city of New Orleans, to Harvey's canal. The men on the raft called to the ferry-boat to assist in landing the raft. The *Margaret* went to the assistance of the raft at considerable peril to herself, and with her steam-power and crew rendered more or less service in getting the raft towards the right bank of the river, where she could be landed in safety to herself and the other shipping in the port; but before the landing was accomplished the large tow-boats *Continental* and *Wasp* came up, and, taking charge of the raft, towed it to a safe landing-place in the lower district.

The owner, captain and crew of the *Margaret* libeled the raft for salvage. The district judge allowed \$51 for the boat and crew. In this court on appeal it is urged — *First*, that a raft of timber is not subject to the jurisdiction of the admiralty court in the matter of salvage; *second*, that the *Margaret* was too small and weak to be able to render salvage services to a large raft; *third*, that no salvage services can be allowed compensation where the property is not saved, and that the raft in this case was saved by the large tug-boats

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and not by the Margaret; *fourth*, that the services of the Margaret were of no value to the raft.

A few undisputed principles taken from the text-books settle this case:

"Salvage is compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on." Marvin, Salvage, § 97. "Salvage may be shortly described as an allowance made for saving a ship or goods, or both, from the damages of the seas, fire, pirates, or enemies." Jones, Salvage, 1. "It is absolutely essential that the salvors should have rendered actual assistance to vessel in distress." Jones, *supra*, 4. "If part of a salvage service is performed by one set of salvors, and the salvage is afterwards completed by others, the first set are entitled to reward *pro tanto* for the services they actually rendered, and this even although the part they took, standing by itself, would not, in fact, have effected the salvage." Jones, *supra*, 9. "Salvage constitutes an important subject of the admiralty jurisdiction, and this jurisdiction may be exercised as well *in personam* as *in rem*." Conkl. Adm., 273. "The district courts shall have jurisdiction as follows: . . . *Eighth*, of all civil causes of admiralty and maritime jurisdiction." Rev. St., § 563.

The district judge was of the opinion, from the evidence, that the services of the Margaret and her crew were more or less valuable in saving the imperiled raft, and allowed \$51 as compensation.

The judgment should be affirmed, and a decree having that effect will be entered.

The Fox.

THE FOX.

Under the act of the legislature of Alabama by which John Grant was authorized to excavate a channel between Dauphin Island and Cedar Point, in the county of Mobile, and to exact tolls from all such boats or vessels as might go in or out of said channel, a tug is not liable for tolls on the boats or vessels towed by her through said channel.

IN ADMIRALTY.

Messrs. Thomas L. Bayne and George Denegre, for libellant.

Messrs. E. M. Hudson and J. Walker Fearn, for claimants.

PARDEE, Circuit Judge. The legislature of Alabama enacted:

"That John Grant be, and he is hereby, authorized to enter upon and take possession of so much of the shoal or shell reef, situated between Dauphin Island and Cedar Point, in the county of Mobile, as may be necessary to cut or excavate a channel or channels of sufficient depth and width to afford a good, safe inland passage for steamboats and other vessels in the trade between the waters of Mobile bay and other places on the Gulf of Mexico, etc.; that, so soon as said Grant shall have deepened or excavated a channel of sufficient depth and width to admit the passage of steamboats or other vessels drawing five feet of water, he shall be authorized to charge and receive from all such boats or vessels as may go in or out of said channel a toll or tonnage duty at a rate not to exceed fifteen cents for each ton of the registered measurement of such boat or vessel, and any boat or other vessel that shall become liable for toll as aforesaid, whose captain, owner or other person who may be in charge, neglecting or refusing to pay the same for five days after the same shall have been demanded, shall be liable to be sued for the amount of the toll due, together with fifty per cent. damages, and said boat or other vessel and their owners

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shall be liable for the same, together with costs of suit, to be collected before any court of competent jurisdiction," etc.

The libel in this case is prosecuted to compel the steamer Fox, which is a tug-boat of about twenty-five tons measurement, to pay tolls for eleven passages through the pass or canal built by John Grant under the authority of said act of the legislature, and also to recover from the Fox tolls on eleven boats and barges by it towed through said pass. The claimant admits liability for the tolls claimed on the Fox, and alleges a tender of the same, but denies liability for the boats and barges admitted to have been towed through the pass.

Taking it for granted in this case, because not disputed by claimant, that the tolls authorized by the act aforesaid constitute a maritime lien on all such boats or vessels as may go in or out of said channel, the only question for decision in the case is whether the relation of a tug-boat to the boat or vessel it has in tow is such as to make it liable for the tolls which the act puts on the boat or vessel. No such liability arises from the legislative grant aforesaid. By that authority each boat or vessel going in or out of the channel is made liable, and the amount of toll may be recovered from the "boat or other vessel, and their owners." The owner of the pass may follow the boat or other vessel going in or out of the channel, or the owner of such boat or other vessel, but he is given no remedy against any other party.

The ordinary contract of towage is one merely covering the furnishing of propelling power to move a boat or vessel from one place to another. See Desty, Shipp. & Adm., §§ 332, 333. In such contracts tug-boats or tow-boats are not common carriers even. *The Steamer Webb*, 14 Wall., 406.

I am unable to see how a tow-boat, towing a vessel through Grant's pass, can be held liable for toll except on its own measurement, unless the liability is implied from the contract of towage, or is incurred by special contract. I think it clear that no such liability is implied from the contract of towage, and there is no suggestion of any special contract.

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The libelant should have a decree for the amount of tolls due on the Fox, and his claim to recover tolls on the boats and barges in this action should be rejected. The claimant having confessed in his answer liability for all libelant is entitled to recover, should pay the costs up to the first decree rendered in the case. All the other costs in the district court and the costs in this court should be paid by the libelant. And it is so ordered.

LIVERPOOL, BRAZIL & RIVER PLATTE NAVIGATION COMPANY V.
AGAR & LELONG.

1. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the partners can be individually charged only through the partnership.
2. Under the law of Louisiana a commercial partnership, so far as the question of jurisdiction is concerned, stands in the same category as a corporation. Therefore a court of the United States has jurisdiction of a suit brought by an alien against a commercial partnership domiciled in Louisiana, one of whose partners is also an alien, and the other a citizen of Louisiana, upon an obligation originating in Louisiana.

Heard on exceptions to the petition.

Mr. W. S. Benedict, for plaintiff.

Mr. Chas. E. Schmidt, for defendants.

BILLINGS, District Judge. The facts relating to the exceptions in this case are undisputed. This is a suit to recover upon a demand in favor of the plaintiff against the defendants as constituting the commercial firm of Agar & Lelong, domiciled and doing business in the city of New Orleans, and there incurring the obligation sought to be enforced. The partnership and each of the members have been cited, and have severally pleaded the want of jurisdiction in this court, on the ground that the plaintiff is an alien, and that Lelong, one of the defendants, is also an alien. It is conceded that Agar is a citizen of Louisiana; that the partner-

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ship of Agar & Lelong was a commercial partnership, domiciled and doing business in the city of New Orleans, and composed of the defendants, Agar and Lelong, and that the obligation sued on originated there. It is urged, as legal consequences of these admitted facts, (1) that since the partnership of the defendants is in active existence under the laws of Louisiana, it alone can be sued upon a partnership obligation; (2) that since plaintiff and one of the defendants' firm are aliens, the court is without jurisdiction as between the plaintiff and defendants' firm.

I think the first proposition is correctly stated. Under the law of Louisiana a commercial partnership is an entity, capable of being sued, is brought into court as defendant by service of citation upon one of its members, and while the ultimate liability of the partners is *in solido* — *i. e.*, joint and several,—they, during the life of the partnership, cannot be charged individually except through the partnership; that is, during the life of the partnership a partner is, like a corporator in a corporation, liable and made to respond individually only through a judgment against the intellectual being of which he is a component part. In *Breedlove v. Nicolet*, 7 Pet., 413, under circumstances exactly similar to those in this case, with reference to a Louisiana partnership, the supreme court maintained jurisdiction and gave judgment in favor of an alien plaintiff against two members of a partnership, though the third was not suable by reason of residing in Alabama. But this point as to the liability of the partnership alone in the first instance, and so long as its active existence continues, was not presented. I think the proposition of law here presented must be maintained as resulting from our peculiar law, though it would be true in no other state of the Union. Elsewhere the partners are always individually liable, and the partnership as a distinct being cannot be cited. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the citation may be served upon the firm by service upon the partner. The exception of the individual

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partners must therefore be maintained, so far as the attempt is made to sue them individually.

2. This brings us to the remaining question. In a suit by an alien against a partnership consisting of two partners, one of whom is also an alien, the partnership being domiciled in Louisiana, and the obligation sought to be enforced originating there, does this court have jurisdiction? I think it has. See *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How., 314, and *Inbusch v. Farwell*, 1 Black, 566. Indeed, under the provisions of the law of Louisiana a partnership is, so far as this question of jurisdiction is concerned, placed in the category of corporations. Both are creations of a state law, and domiciled in that state. Both may have members who, by themselves, could not be brought within the jurisdiction of the circuit court. Nevertheless, the supreme court has finally settled the doctrine that state corporations, domiciled within the state by which they are created, are, so far as relates to the enforcement of rights of action by suit, citizens of that state, although some of the corporators would not be within the jurisdiction. *Louisville R. R. Co. v. Letson*, 2 How., 497; *Railway Co. v. Whitton*, 13 Wall., 270. The reasoning which leads to this conclusion, with reference to corporations, leads to the same conclusion with reference to Louisiana commercial partnerships.

The exception, so far as it raises the question of jurisdiction over the partnership, is overruled.

NEW ORLEANS NATIONAL BANKING ASSOCIATION AND OTHERS
v. E. D. LE BRETON, ASSIGNEE, AND OTHERS.

A suit in equity brought by a mortgagee to set aside a fraudulent conveyance of the land covered by his mortgage, and to foreclose the mortgage, is well brought in his own name, notwithstanding the fact that the mortgagor since the fraudulent conveyance has been adjudicated a bankrupt and an assignee of his estate has been appointed.

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The case is sufficiently stated in the opinion of the court. *Messrs. J. D. Rouse, Wm. Grant, Andrew J. Murphy and Ed. W. Huntington*, for complainants in bill and cross-bill. *Messrs. James McConnell, Robert Mott and Henry B. Kelly*, for defendants.

PARDEE, Circuit Judge. The case made by the bill and reiterated in the cross-bill shows that the complainants are the holders of certain mortgage paper given by one Williams and bearing on a certain sugar plantation in the parish of Terrebonne, in this state; that S. H. Kennedy & Co. were also holders of mortgage rights on the same plantation; that Kennedy & Co. combined with Williams to make a fraudulent transfer of the plantation, so as to defeat the other mortgage holders, in pursuance whereof a pretended judicial sale was made, S. H. Kennedy becoming the purchaser and transferee, and entering into possession; that subsequent thereto Williams took the benefit of the bankrupt act and received his discharge; that the indebtedness of Williams to complainants was admitted on the bankruptcy schedules; and that defendant E. D. Le Breton was the duly appointed assignee in bankruptcy.

The relief sought is to have the alleged fraudulent transfer annulled as against complainants' demands, the plantation declared subject to their mortgage rights, for an account, and a foreclosure. The demurrers are on the ground that the complainants have no right to bring and maintain the suit; but the suit, if brought at all, must be brought by Williams's assignee in bankruptcy.

It seem to be clear, and it is conceded for this case, that all suits brought for the benefit of the bankrupt's estate must be in the name of the assignee, who represents that estate, and that a general creditor, an unsecured creditor, a creditor at large, in short any creditor who must look to the bankrupt's estate for his claim, or who derives any of his rights of action by or through the bankruptcy, cannot maintain an action to set aside a fraudulent conveyance of the bankrupt.

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And, for the purposes of this case, we may go further, and concede that no action, pure and simple, for the annulment of a fraudulent conveyance — no revocatory action — can be brought or be maintained by the creditor or creditors of a bankrupt; but such action must in all cases be brought and be maintained by the assignee in bankruptcy. See *Glenny v. Langdon*, 98 U. S., 20.

But such rule does not seem to affect the case under consideration. The complainants derive none of their alleged rights through the bankruptcy. Williams's solvency or insolvency would not defeat their action. The suit is not for the benefit of the bankrupt's estate; it is not intended or calculated to bring a dollar to the hands of the assignee. It is not clear that if successful it will indirectly benefit the bankrupt's estate, even by relieving it of general liability. It is not clear that the assignee could maintain the suit, nor that if he could it would in anywise be to his interest to bring it. See *Dudley v. Eastern*, 104 U. S., 99. The complainants have an interest adverse to the assignee in so far as they claim mortgage rights; for, while it appears that the amount of their claims against the bankrupt are fully admitted on the schedules, it does not appear that their mortgage rights are admitted. If not admitted, a suit to enforce them would be adverse to the assignee's interest.

The view I take of this case is that it is a bill to foreclose a mortgage; a bill to foreclose notwithstanding a fraudulent transfer of the mortgaged property; a bill to foreclose notwithstanding the bankruptcy of the mortgaged debtor.

It seems clear to me that the demurrers should be overruled, and the defendants required to answer. And such judgment will be entered.

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APRIL TERM, 1883.

DE VIGNIER V. THE CITY OF NEW ORLEANS.

FOLSOM BROTHERS V. SAME.

1. Where municipal bonds were exempted by law from taxation, the exemption was held to continue after they had been reduced to judgment.
2. Unless otherwise provided by law prior to their issue, municipal bonds have their *situs* where their owner resides, and when owned by non-residents of the state cannot be constitutionally subjected to taxation either by the state or the municipality which issued them.
3. A court having rendered judgment against a municipal corporation has jurisdiction to protect the judgment from all illegal procedures, under the pretext of taxation or otherwise, by which the judgment debtor seeks to assert a lien thereon, or reduce its amount.

The bills in these cases were filed by the complainants, they being citizens of states other than the state of Louisiana, against the city of New Orleans, to enjoin and restrain the city from the assessment and collection of taxes upon judgments recovered against it by the complainants respectively. The cause was heard upon demurrer to the bill.

Mr. Robert Mott, for the complainants in both cases.

Mr. Charles F. Buck, City Attorney, for the defendant.

BILLINGS, District Judge. In the first case the judgment is for coupons of consolidated bonds issued by the city of New Orleans.

In the second case the judgment is for damages occasioned by destruction of property by a mob.

In *State Tax on Foreign-held Bonds*, 15 Wall., 300; *Murray v. Charleston*, 96 U. S., 432; and *Hartman v. Greenhow*, 102 U. S., 672, the supreme court of the United States have settled, among other propositions of law, the two following, which apply to these cases:

- (1) That the exercise of the power of taxation by municipal corporations is such an act of legislation that if it im-

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pairs the obligation of a contract it is within the prohibition of article I, § 10, of the constitution of the United States, that no state shall pass a law impairing the obligation of a contract.

(2) That obligations to pay money on the part of states or cities, while they may be property, are not so localized as to be property within a state or city, when held by persons residing outside thereof.

It can hardly be doubted but what the *status* of obligations, so far as relates to exemption from taxation before suit, would continue after suit; otherwise the debtor, by making default in the performance of his contract, would cast an additional burden upon the creditors, and cause a subtraction from the amount due. This was the judgment by the legislature of Louisiana, for, in the charter of 1856, act No. 164, § 67, they provide that "any bond, mortgage, note, contract, account, or other demand belonging to any person not being a resident of the city of New Orleans, which shall be sent to said city for collection, or shall be deposited in said city for said purpose, shall be exempt from taxation."

The city charter of 1870 (article No. 7, § 15, subd. 6) specially exempted from taxation the consolidated bonds, without reference to the residence of the owner. But, independently of these legislative acts, the law must be that in the absence of any provisions of the statute which had entered into and formed part of the contract, giving the right to impose a tax, bonds, or other obligations of a city, which belong to non-residents, could not be taxed without impairing the force of the obligation itself; for, as a rule of law, where there is no pre-existing legislation they have no *situs* except that which is imparted by the residence of the owner, and to attempt to tax outside of that residence is to add to the qualities of personal property that of having an artificial and forced location, contrary to the settled rules which govern that class of property.

It is not necessary in these cases to consider the question of the power of the city to tax the debts which it owes to

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those who reside within it, whether they are represented by bonds or exist in judgments.

As to the jurisdiction of this court: In one of the cases the judgment was obtained in this court; in the other, in the state court. In the case pending here this court has jurisdiction to protect the judgment, which is the right of the plaintiff to recover a certain amount of money from all illegal procedures on the part of the debtor which assert a lien, and, if not arrested, might end in a complete divestiture of title. In the case pending in the court of the state, the amount, with the interest claimed, will, before the proceedings to enforce the tax culminate, make more than the sum of \$500, which is required to give this court jurisdiction in an original suit.

The demurrer in each case is therefore overruled, and the defendants may have until next rule-day to answer.

THE OUACHITA & MISSISSIPPI RIVER PACKET COMPANY v. MRS. CATHERINE M. AIKEN, ADMINISTRATRIX, ETC., AND OTHERS.

1. The exaction of unreasonable and exorbitant wharfage is not the laying of a duty of tonnage.
2. An ordinance and contract by which a city farmed out its wharves to private individuals, and prescribed the rates of wharfage which they might exact, are not a regulation of commerce with foreign nations and among the several states in derogation of the exclusive power of congress over that subject.
3. As long as congress has passed no law regulating wharfage, the courts of the United States have no jurisdiction to abrogate state laws on the subject, on the ground that the rates of wharfage allowed are unreasonable and exorbitant.

(Before Woods and Pardee, JJ.)

Final hearing on pleadings and evidence.

Messrs. J. H. Kennard, W. W. Howe, S. S. Prentiss and C. S. Rice, for complainants.

Messrs. W. S. Benedict and George Denegra, for defendants.

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Woods, Circuit Judge. This was a bill in equity, filed by the Ouachita & Mississippi River Packet Company, a corporation and citizen of the state of Kentucky, and certain persons, citizens of the states of Ohio, West Virginia and Louisiana, respectively, against the defendants as partners under the firm name of Joseph A. Aiken & Co., and against the city of New Orleans, to restrain the collection of wharfage dues.

It appears from the pleadings and evidence that under an act of the legislature of Louisiana, the city of New Orleans, being empowered to collect wharfage for the use of its wharves on the Mississippi river within its limits, on May, 17, 1881, adopted an ordinance providing for the building and repairing of the wharves and levees of the city, and for farming the revenues thereof. In pursuance of said ordinance, the city made a contract with Joseph A. Aiken, by which he was authorized for the term of five years to collect wharfage from all steamboats and other water craft landing at the wharves of said city, the rates of wharfage being fixed by an ordinance of the city. On his part Aiken agreed to accept the wharves in the condition in which they were on May 21, 1881, and to repair and keep them in good order and condition for said term of five years; to build certain additional new wharves, at an expense not exceeding \$25,000; to build new revetments; to build a piled bulkhead in the third district; to light a specified portion of the levees and wharves with electric lights; to pay \$20,000 annually to maintain a harbor police for the protection of commerce along the river front of the city, and \$10,000 to be applied to the salaries of wharfingers, etc.

The ordinance and contract fixed the following, among other rates of wharfage, which Aiken and his associates were permitted to charge: For steamboats—"Not over five days, ten cents per ton, and each day thereafter \$5 per day; for boats arriving and departing more than once a week, five cents per ton each trip; boats lying up for repairs during the summer months, to occupy such wharves as may

not be required for shipping, for twenty days or under, \$1 per day."

The contract and ordinance further provided that for the third year of said lease Aiken should reduce the wharfage on steamboats and other licensed vessels employed in transporting merchandise on the Mississippi river ten per cent., and for the fourth and fifth years twenty per cent., etc.

The bill charged that the ordinance and contract were null and void, because the rates of wharfage were unreasonable, excessive and unjust; and that the revenues derived from wharfage were used in part to pay the salaries of the public police of the city of New Orleans and the salaries of officers belonging to the office of the department of commerce of said city, and for the building of new wharves and other new structures; that said exactions of wharfage were in violation of the constitution of the United States, because they were the laying of a duty of tonnage without the consent of congress, and were a regulation of commerce with foreign nations and among the several states.

The prayer of the bill was for an injunction to restrain the defendants from demanding or collecting said wharfage dues, and that said ordinances of the city of New Orleans and said contract with the defendants might be declared illegal, unconstitutional and void.

All the defendants are citizens of the state of Louisiana. Of the complainants, some are citizens of the state of Louisiana, and some are citizens of other states. It is, therefore, obvious that the jurisdiction of this court over the case cannot rest upon the citizenship of the parties. Act of March 3, 1875, "to determine the jurisdiction of circuit courts of the United States," etc.; *Removal Cases*, 100 U. S., 457.

The case is, therefore, in respect to citizenship precisely in the same plight as if all the parties were citizens of the state of Louisiana, and in this respect is similar to the case of *The Parkersburg Transportation Company v. The City of Parkersburg*, to be reported in 107 U. S., where both the

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complainant and the defendants were citizens of the state of West Virginia.

An examination of that case will show that none of the grounds upon which the collection of wharfage in this case is complained of can be maintained.

The exaction of wharfage is not the laying of a duty of tonnage. The ordinance and contract complained of in this case impose charges for wharfage only; that is to say, the steamboats and other water craft from which wharfage is collected are required to pay only for the use of the wharves. No demand is made of them for entering, loading or lying in the port or harbor. This court cannot, therefore, entertain an averment that the charges were not intended as wharfage, but as a duty of tonnage. Whether they are one or the other must be determined by the ordinance and the contract. The fact that the wharfage exacted may be unreasonable and exorbitant does not change its character. It is still wharfage, and nothing else. This court cannot, therefore, grant relief on the assumption that the exaction of wharfage is the laying of a duty on tonnage without the consent of congress.

Neither can we base relief on the theory that the ordinance and contract complained of constitute a regulation of commerce in derogation of the exclusive power of congress over that subject. In the case of *County of Mobile v. Kimball*, 102 U. S., 691, it was held by the supreme court that "state action upon such subjects—those which are not national, but local and limited in their nature, such as harbor, pilotage, beacons, buoys, etc.—can constitute no interference with the commercial power of congress, for when congress acts the state authority is suspended. Inaction of congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing should be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state

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authority." So in the case of *Parkersburg Transportation Company v. Parkersburg*, *ubi supra*, the same court declared: "It is manifest that no subject can be more properly classified as local in its nature and as requiring the application of town regulations than that of wharves and wharfage." And in the same case it was further said: "As no act of congress has been passed for the regulation of wharfage, and as there is nothing in the constitution to prevent the states from regulating it so long as congress sees fit to abstain from action on this subject, our conclusion is that it is entirely within the domain and subject to the operations of state laws."

But complainants contend that the wharfage exacted by defendants is exorbitant and unreasonable, and therefore this court has jurisdiction to interfere. But it is manifest that if the matter of wharfage can, without any infringement of the constitution, be regulated by local law, the question whether the wharfage dues demanded are or are not reasonable must be determined by that law.

It would be absurd to say that as long as congress did not act the matter of wharfage might be properly regulated by the states, and then, without any action by congress, to hold that the courts might abrogate the state laws on the subject. It was therefore declared in the case of *Parkersburg Transportation Company v. Parkersburg*, that "the reasonableness of wharfage must be determined by the local law until some paramount law has been prescribed."

We have, therefore, no ground upon which to interfere with the local regulation of wharfage which is attacked in this case. The defendants are authorized by the local law to charge certain rates of wharfage, and there is no averment or proof that these rates have been exceeded. The defendants are therefore protected by the local law in the matters of which complaint is made against them in the bill; and that local law is not in violation of any provision of the constitution of the United States or in contravention of any act of congress.

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All the other grounds of relief set out in the bill resolve themselves into complaints of the excessive and exorbitant rates of wharfage.

There is, therefore, no averment in the bill which can be the basis of the relief prayed for. We may remark, however, that the exactions of wharfage are substantially expended for the benefit of those using the wharves, and that the proof does not satisfy us that the rates are exorbitant or excessive.

The result is that the bill must be dismissed at the cost of complainants, and it is so ordered.

PARDEE, Circuit Judge, concurred.

MYRA CLARK GAINES V. THE CITY OF NEW ORLEANS.

1. A court of equity has jurisdiction of a bill filed to recover the rents and profits of real estate which had been possessed in bad faith by a defendant and its grantees for a period of forty-five years, by which a discovery and the taking of an account, necessarily ramified and of complicated character, were prayed.
2. Where a municipal corporation, being a purchaser and possessor in bad faith, had sold and conveyed with warranty distinct parcels of the land possessed, for large sums of money, to several hundred grantees, against whom in one suit the real owner had obtained a decree establishing her title, *held*, that it was liable for rents and profits enjoyed by its grantees, and that a bill in equity would lie against it to recover the same, the said grantees being insolvent, and there being no privity between them and the real owner.
3. A suit for the rents and profits of lands, held by a possessor in bad faith, cannot be commenced, and the prescription against the demand does not begin to run, until the plaintiff has recovered judgment for the possession of the lands.
4. Where, in a suit to recover a tract of land, the defendant disclaims any title or possession thereof, except as to a certain part particularly described, and there is judgment against him as to that part, but the court enters no judgment as to the portions disclaimed, *held*, that such suit is no bar to another suit against the same defendant to recover rents and profits for the parcel for which the disclaimer was made.

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5. Neither is the decision of the court in such a case, made upon exceptions to the master's report, that the defendant could not be treated as a trustee for the plaintiff for the price received by him for the sale of the lands disclaimed, a bar to another suit to recover the rents and profits of the lands embraced in the disclaimer.
6. The fact that in a suit against a large number of persons the subpoenas for some of the defendants against whom decrees *pro confesso* had been taken were not found in the record, does not render the decrees on the merits against such defendants irregular and fraudulent.
7. Where decrees *pro confesso* had been set aside on condition that defendants should speed the cause which sought to enforce rights springing from an inheritance long in litigation, and in respect to which the controlling principles had been settled by the court of last resort, and where a part of the bill had, on demurrer, been declared by the court to be good, *held*, that it was within the discretion of the court, before answer, to order a reference to a master to state an account based upon that portion of the bill which had been sustained, provided such reference could be made without prejudice to the rights of the parties.
8. A possessor in bad faith, who employs the process and machinery of the courts with the purpose of depriving another of what he knows is justly his, is under obligation to satisfy all damages which that other may thereby suffer.
9. Such obligation of the possessor in bad faith is not diminished by the fact that it has raised and conducted defenses in the capacity of a warrantor.
10. A judgment is binding on a warrantor if he has been called in warranty, or has been apprised of the bringing of the suit.
11. A possessor in bad faith is liable not only for rents and revenues and values for use actually received, but also for those which might have been received with ordinary good management.
12. When a defendant has, in bad faith, kept the plaintiff, who is the true owner, out of possession of her property, known by it to belong to her, its liability is not limited by the redress given against those to whom the possessor in bad faith has sold and warranted the property, but extends to all the loss which she has suffered for the entire period during which she has been kept out of possession.
13. According to the jurisprudence of Louisiana, if in a suit to recover rents and profits from a possessor in bad faith, evidence of the sums actually received is not through the fault of the defendant attainable, the court may take as a guide the rents and profits shown to have been received for the same period from other adjacent property of like value and of like capacity for producing rents and revenues.

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IN EQUITY. Heard upon pleadings and evidence, master's report, and exceptions thereto for final decree.

The bill of complaint set forth the title of the complainant Myra Clark Gaines to the tract of land known as the "Blanc tract," which is situated in the city of New Orleans, contains about one hundred and thirty-five arpents, and is described by metes and bounds in the bill.

The bill then proceeded to state the circumstances under which the complainant derived the title to said tract of land, viz.: that she was the legitimate daughter of Daniel Clark, who, at the time of his death, August 16, 1813, owned the same in fee simple; that by his last will and testament, executed July 13, 1813, he bequeathed the same to the complainant; that said last will and testament was, after his death, suppressed, and an earlier will substituted and probated.

The bill then averred that the complainant, who was born in 1806, was kept in ignorance of her parentage and of her rights under the true will of said Daniel Clark, her father, until the year 1832; that the defendant, the city of New Orleans, in the year 1834, for the sum of \$42,000, obtained a pretended title to said tract of land from the executors of the false will, without the necessary forms of law; that then and at all times subsequent, the defendant well knew of the vice of the title attempted to be conveyed to it, and of the rights of the complainant to said tract of land; that in the year 1837 the defendant sold said tract of land, and received therefor the price of \$586,000, and conveyed the same with full warranty to numerous purchasers, which purchasers conveyed the same by mesne conveyances and with subrogation of all the rights of warrantees, to parties from whom the complainant, in the year 1877, recovered the same after a series of suits, which are enumerated in the bill; that said suits, together with the efforts of complainant to probate the genuine will of her father (said Clark), which efforts were successful in causing the probate of Clark's true will in 1855, occupied the whole period from the year 1836 to the year 1877; that all of said suits were either against the de-

fendant or against its warrantees, and were all actively resisted by the defendant throughout this entire period.

The bill also recited proceedings alleged to have been fraudulently instituted and conducted by defendant, with the object of revoking the decree probating the genuine will of said Clark, whereby the complainant was for a long period further hindered; that the reason and motive of this resistance on the part of the defendant to the claims and rights of the complainant to said tract of land, had been to avoid the repayment on defendant's part, to its warrantees, of the price unjustly received and the value of the fruits; that this resistance had been kept up by the defendant for a period of almost fifty years, in bad faith and with a full knowledge of complainant's rights; that but for such resistance, the occupants of said tract of land, who were warrantees of the defendant, would have surrendered possession to the complainant.

The bill then averred that the occupants of said tract of land, from whom the same had at last been recovered by the complainant, and against whom a recovery had been had for partial fruits, viz., for the periods of time of their respective occupations of the several portions of the said tract, were insolvent.

The bill further averred, in substance, that in the year 1834, the defendant having fraudulently entered upon the complainant's land and sold the same for the sum of \$586,000, in order to retain this price without any return of the same, had throughout the period of fifty years, and until May, 1877, by a gigantic and ramified system of litigation, fraudulently undertaken and fraudulently continued, maintained a successful resistance to the known rights of the complainant; and that by such fraudulent hindrance, the defendant had made itself liable to the complainant for the rents and profits which, but for such hindrance, the complainant would have received.

The bill prayed for a discovery, for answers to annexed interrogatories, and for an accounting, and a decree for the

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rents and profits of which the complainant had been deprived by the fraudulent hindrance of the defendant from the year 1836, when the same commenced, down to the year 1877, when, in spite of the same, possession was by the complainant finally recovered.

Messrs. Wm. Reed Mills and Alfred Goldthwaite, for complainant.

Messrs. Charles F. Buck, City Attorney, and *James R. Beckwith*, for defendant.

BILLINGS, District Judge. There can be no doubt that this cause is one over which a court of equity must take jurisdiction.

It is an incident, and in its nature a supplemental proceeding, to a litigation as to the heirship and title of the complainant to certain real property, which has been conducted, in this court, between the parties hereto, for upwards of forty years, and always upon the equity side of the court. It is a suit for a discovery as to the means which have been employed by the defendant throughout this long period to prevent and hinder the complainant from recovering possession of this real property. See Comyn's Digest, Chancery (3 B. 1), where it is laid down that a bill for discovery lies even when the action to be supported sounds in tort.

It is a suit for an accounting as to the rents and profits of this real property, for the period of forty-five years, which must be taken according to the laws of Louisiana, and in which, therefore, the defendant must be charged with the rents and profits which have been or ought to have been annually received and credited with the yearly expenditures for reclamation, improvements and taxes, and that, too, with reference to hundred of lots of ground. It is an account, the correct statement of which by the master occupies three hundred pages, and upon which the record shows he has been occupied almost three years. It is, therefore, an account of a most complicated and ramified character, which could not be dealt with upon a trial at law at *nisi prius*.

The fact that the constitution of the United States guarantees to all suitors in common law cases, where more than \$20 is involved, a trial by jury, should insure precision on the part of courts in discriminating as to the proper character of causes, but cannot change the answer to the question as to whether a cause is of equitable cognizance. That must depend upon whether it be such a cause as the English court of chancery would have taken cognizance of at the time of the adoption of the constitution of the United States.

The case of *Root v. Railway Company*, 105 U. S., 189, relied on by defendant, by no means excludes this case from the equity courts. On the contrary, while it holds that, where there is no element of trust, and where there are no other special circumstances which would authorize jurisdiction in equity, an action for an account is an action at law; it adds the express reservation, p. 216, that "an equity may arise out of, and inhere in, the nature of the account itself, if it render a remedy in a legal tribunal *difficult*, inadequate and incomplete."

In *Hipp v. Babin*, 19 How., 271, there is the same exception made. That was a suit for a naked accounting as to rents and profits. There were no equity features. The court, in declining jurisdiction, p. 279, says: "To authorize jurisdiction it must appear that the courts of law could not give a plain, adequate and complete remedy," and that that case did not show that justice could be administered with less expense and vexation in a court of equity than in a court of law.

In *Ex parte Baz*, 2 Ves. Sr., 388, Lord Hardwicke said: "In an action at law an account is to be taken by auditors. Indeed where the auditors have taken the account, and on charging and discharging the items, issues may be joined; and so many issues then may be tried; actions at law, therefore, for accounts, are so few because so long time is required.

In *O'Connor v. Spaight*, 1 Schoales & Lefroy, 305, Lord Redesdale said (this was an action for an account by a landlord against a tenant for rent): "The ground on which I

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think this is a proper case for equity is that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy." "This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable by courts of law, are yet so involved with a complex account that it cannot properly be taken at law."

In *Corporation of Carlisle v. Wilson*, 13 Ves. Jr., 278, the lord chancellor (Erskine) says: "The principles upon which courts of equity originally entertained suits for an account when a party had a legal title is, that, though he might support a suit at law, a court of law either cannot give a remedy, or cannot give so complete a remedy, as a court of equity."

In *Weymouth v. Boyer*, 1 Ves. Jr., 416, Mr. Justice Buller, sitting for the chancellor (Lord Thurlow) says: "We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, he would not pronounce against the equity jurisdiction. The same principle has been laid down by Lord Bathurst."

In *Fowle v. Lawrason*, 5 Peters, 494, the supreme court says: "In all cases in which an action of account would be the proper remedy at law, the jurisdiction of a court of equity is undoubted. In transactions not of the peculiar character of those in this case, great complexity ought to exist to give jurisdiction."

In *Barber v. Barber*, 21 How., 589, the court says: "It is not enough that a court of law also has jurisdiction; the remedy at law must be as practicable and efficacious to the ends of justice and its prompt administration to exclude."

In *Mitchell v. Great Works Man. Co.*, 2 Story, 648, Justice Story, overruling a demurrer to a bill for an account, says: "Considering the complications and charges of interest, the claims cannot be adequately examined except in a court of equity."

In *Nelson v. Allen & Harris*, 1 Yerg., 369, the court say: "It is contended by the defendants, that, as the plaintiff's title

is a pure legal title, he has a remedy at law for the mesne profits, and that, if his bill had been demurred to, it would have been dismissed. This position is wholly gratuitous, unsupported either upon principle or authority. It has been overlooked by them that courts of equity have concurrent jurisdiction with courts of law in cases of account." See also Judge Whyte's review of the English cases at p. 373.

"So there shall be an account in equity for mesne profits." Comyn's Digest, Chancery (2 A. I). "But not till possession has been recovered, as trespass will not lie, at law, for them, till then." Comyn's Digest, Chancery (2 A. 2).

"Equity will decree an account of rents and profits whenever the account is intricate and complicated, and, therefore, not easily adjusted at law. And this holds not only where the matters grow out of a privity of contract, as between landlord and tenant, but in many cases of adverse and conflicting claims." Holcombe's Equity, p. 85.

See also 1 Maddock, Chancery, 868; Cooper's Equity Pleading, 134; *Ludlow v. Simond*, 2 Caines' Cases in Error, 40, per Thompson, Judge; *Knotts v. Tarver*, 8 Ala., 743, and *Printup v. Mitchell*, 17 Ga., 558.

From an early date equity decreed an account of mesne profits when there were particular circumstances which involve an equity. By the lord keeper in *Tilly v. Bridges*, Pre. Ch. (Finch), 252. This exception excludes all cases which involve an equity which cannot be made available at law. Fonblanque's Equity, vol. 1, marginal paging 14 and 15, and note (4th Am. ed., by Laussat). If the recovery of the demand had been unconscientiously obstructed, that of itself constituted an equity. *Curtis v. Curtis*, 2 Bro. Ch., 633. Per Sir Lloyd Kenyon, afterwards chief justice and Lord Kenyon.

The gravamen of a bill of complaint is that the defendant, by her direct efforts, persisted in *mala fide*, has kept the complainant out of possession for forty-seven years, and until any remedy by an account at law is practically impossible. This allegation alone, according to the principle laid down

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in *Pulteney v. Warren*, 6 Ves. Jr., 73, would give jurisdiction.

But there is another distinct ground of equity jurisdiction here. The complainant has recovered judgment against several hundred actual tenants for rents and profits for varying portions of this long period. These tenants are insolvent. The defendant in this action is the warrantor of all those tenants, and whatever they owe the complainant the defendant owes to them. The defendant is not only a warrantor, but she is a warrantor who has enriched herself by purchasing in bad faith the complainant's property, and selling it at a profit of \$500,000. This sum she has retained, and has had the use of since the year 1837. The complainant has no remedy at law upon this warranty from want of privity. Equity, therefore, gives her a right of action. This case is, in principle, the case of *Riddle v. Mandeville*, 5 Cranch, 322, where "an indorser of a promissory note, who had been adjudged to have no remedy at law against a remote indorser, was held to be entitled to maintain a suit in equity against him, on the ground that the defendant, as the original indorser of the note, was ultimately responsible for it; and that equity would decree the payment to be made immediately, by the person ultimately responsible, to the person actually entitled to receive the money."

It is but another application of the principle laid down by Mr. Story in his *Equity Jurisprudence*, section 687, that where an owner and lessor would have no action at law against an under-tenant upon his covenant for rent, still, if the original tenant was insolvent, equity would give the owner a direct action against the under-tenant. The reason assigned by Mr. Story is, that the under-tenant should not be permitted to enjoy the profits of possession without accounting to the original lessor, because, if the original lessee had paid, he would have had a remedy over against the under-tenant.

It is but another application of the well settled principle recognized in the familiar case put by Chief Justice Marshall

in *Riddle v. Mandeville*, *ubi supra*, of a right of action by a creditor of an estate against the legatees of his debtor. "If," says Chief Justice Marshall, "doubts of his right to sue in chancery could be entertained while the executor was solvent, none can exist after he has become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may in a court of equity be asserted by the creditor, and as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible."

The principle here to be invoked, and which is controlling, is that equity will not allow a party ultimately liable, for his own advantage, to keep the owner out of possession and an intermediate and insolvent party in possession, who is, in turn, responsible to the lawful owner, and thereby to enrich himself out of the property of that owner, thus possessed, and escape liability to him, for want of a mode of action.

This principle is laid down in broader terms by Lord Justice Turner in the case of *The Emperor of Austria v. Day & Kossuth*, 3 De Gex, F. & J. (64 Eng. Ch.), 217, thus: "The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction of this court extends, mentions cases of this class where the principles of law by which the ordinary courts are guided give no right, but upon principles of universal justice the judicial power is necessary and the positive law is silent."

The conclusion, therefore, is unavoidable that this suit is properly brought as a suit in equity.

1. Because as a bill for discovery of the participation of the defendant in, and her advantage from, the provoking and maintaining a litigation which, commenced in bad faith, has, upon various pretexts, been made to keep the complainant out of the enjoyment of a large inheritance for forty-seven years; and

2. Because, whether the bill of complaint be viewed as an incident to a litigation which has lasted in a court of

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equity for half a century, calling for an account for rents and profits for that whole period as to a vast number of separate lots, and calling for a distinct and detailed statement of account for each lot, under a system of law by which, on the one hand, the annual profits or value for use, and on the other hand the yearly disbursements for ameliorations and taxes, must be ascertained and stated, and where it is made to appear that this exhaustive complexity is altogether due to the hindrances which have been interposed by the defendant, or whether the bill of complaint be viewed as leveled at a defendant who, under an obligation to indemnify a possessor in case of eviction, and for the purpose of retaining an enormous price unjustly obtained and avoiding a liability for fruits which must be rendered to the real owner upon her recovery of possession, has, directly as well as through that possessor, by all manner of legal artifices, in bad faith, kept that owner out of possession of her own, that possessor having no means wherewith to respond to the owner when evicted and adjudged to deliver up the property with its fruits, whether the bill of complaint is viewed with reference to either of the distinct grounds which it presents for equitable jurisdiction — *a fortiori*, if it be viewed with reference to all, it states a case over which a court of equity has undoubted cognizance.

As to the cause upon the bill, amended bill, answer, pleas and proofs:

The averments of the bill which it is necessary to consider are as follows: That the complainant was the legitimate daughter of Daniel Clark, and by his last will and testament (will of 1813) became his universal legatee and inherited the property known as the "Blanc tract," which is set out in the bill by metes and bounds; that in the year 1834 the First Municipality, a corporation whose property and liabilities were by the amended charters transmitted to the present city of New Orleans, fraudulently obtained possession under a pretended title of the said "Blanc tract," and in the year 1837 divided it into squares and lots, and for a price exceed-

ing \$400,000 conveyed it to a multiplicity of grantees, who, by mesne conveyances, granted in parcels and subdivisions said tract to tenants, who, as well as the original and intermediate grantees, took in bad faith. The bill further avers an eviction and recovery by the complainant against these tenants for the entire tract and for fruits for portions of the time of disseizin; their insolvency; that the defendant is a warrantor of all said tenants, was notified, and, in fact, made the defenses in the suits terminating in the judgments for eviction and for fruits; that a separate suit for a portion of this tract was commenced and maintained against the defendant, in which all of the facts and propositions of law relating to complainant's title and the liability and wrongdoing of the defendant were judicially determined; that, in spite of the requests of the tenants to surrender to the complainant, the defendant compelled them by threats to allow her to continue the defenses; that as a final resort, when the rights of the complainant had been, after thirty-five years of litigation, fully established by the probate of the spoliated will of Daniel Clark by the supreme court of this state, and by the complete establishment of the rights of the complainant to this property as against the defendant, by decrees between these parties, by the supreme court of the United States, the defendant, in the year 1867, caused a suit to be instituted for the pretended purpose of revoking the probate of the will of Daniel Clark, and thereby delayed and hindered the complainant's recovery for a further period of ten years; that all this delay and hindrance has been caused by the defendant alone for the purpose of enriching herself by thereby saving herself from her ultimate liability upon her warranty for the return of the price and for fruits and revenues; and upon these averments the complainant demands judgment against the defendant for the rents which were received and which ought to have been received, and which the complainant would have received but for the alleged long continued and enormous wrong of the defendant.

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The defenses contained in the answer of the defendant are in substance a denial of the bill, as well as

1. Plea of prescription of one, two and three years.
2. Good faith of the defendant.
3. Reduction of amount alleged by the bill to have been received for the property at public auction.
4. Collusion in the case of *Gaines v. Hennen*.
5. Denial of insolvency of the tenants.
6. Plea that the judgment in the case of *Gaines v. The City of New Orleans* is such an adjudication as precludes complainant from bringing this suit; and
7. Irregular and fraudulent character of some of the judgments in the Agnelly and Monsseaux, *i. e.*, the possessory, suits.

I will consider these defenses *seriatim*:

1. Prescription.

This is a suit which, according to all authorities, both under the common law and the law of Louisiana, could not have been brought until the complainant had recovered possession. *Gaines v. The City of New Orleans*, 15 Wall., 624. Her judgments in the Agnelly and Monsseaux cases, wherein she recovered judgment for possession and for partial fruits, were rendered May 7, 1877, and therefore did not become final until May 3, 1879.

This present suit was filed August 7, 1879. All ground even for discussion as to prescription is wanting.

2. Good faith of the defendant.

This issue has been absolutely and finally settled adversely to the city of New Orleans, in *Gaines v. The City of New Orleans*, 6 Wall., 642, and 15 Wall., 624.

3. As to the amount of price received from the sale of the Blanc tract at the public auction in 1837.

The report of the master and the adjudication shows the aggregate amount derived from this sale to have been \$482,525, besides \$86,405, the amount of price of adjudication of certain lots for which no evidence of deeds of sale appears. Master's Report, p. 24.

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4. As to any alleged collusion between the parties in the case of *Gaines v. Hennen*. There is not a scintilla of evidence in the record in support of this averment; and it becomes of little moment except as bearing upon the question of good faith of the defendant. This has, as has been observed before, been settled, and is no longer an open question.

5. The matter of the insolvency of the tenants appears by the testimony of Florville Foy and Jules Vienne.

6. Plea that the judgment in the case of *Gaines v. The City of New Orleans* is such an adjudication as precludes the complainant from bringing this suit. The suit here referred to is known in this record as suit No. 2695. It was an ejectment suit conducted on the equity side of this court as a suit in part for discovery. It was filed originally with reference to the whole Blanc tract. The defendant's answer contained a disclaimer as to any title or possession of the tract except that square upon which was situated the draining machine and some other small pieces. The answer disclosed the names of the occupants who were alleged to be in possession of the rest of the tract. Upon the coming in of defendant's disclaimer the complainant took no further proceedings as to the portion of the tract covered by it, and the cause proceeded, and the judgment was with reference to the portion as to which possession was not disclaimed. There was no judgment upon the disclaimer. In fact no issue was joined upon it. The judgment has precisely the same scope and effect as if the bill as originally filed had sought a discovery and recovery of property and fruits as to the square occupied by the drainage machine alone, and the other squares not included in the disclaimer.

Indeed, after the disclaimer, it became necessary that the possessory actions against the occupants should be commenced and terminated before this present action would lie.

An exception was made after the cause had come back from the supreme court, and was before the court upon the master's report, which presented the question whether the

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complainant could treat the city as a trustee for the price received by her for the Blanc tract.

The question was solved by the court declaring that in an ejectment bill against a party holding by an adverse title there could be no trust raised up as to the price received, in case of sale of a portion, *i. e.*, that the whole aim of the bill was inconsistent with the claim thus urged by the exception. This ruling and decree can by no construction be made to be adverse to, or even relate to, the claim presented here. This claim is not only not inconsistent with the ejectment suit, but follows and could only follow as a consequence from that suit and the recovery in the possessory suits.

The revenues upon which the master has reported are those derived or derivable from lands not included in the suit No. 2695, after the disclaimer and not embraced in the judgment.

7. That some of the judgments against the tenants (in the Agnelly and Monsseaux suits) were irregular and fraudulent.

The evidence which seems to be relied upon is that, in some of the instances in which judgments *pro confesso* were entered, the subpcenas are not in the records.

This by no means overcomes the *prima facie* case made by the judgment itself, as it cannot be presumed the court would have rendered it without proof of service of process.

I do not find that the special defenses are in any respect sustained.

The exceptions to the report of the master are for the most part treated and disposed of in the subsequent portions of the opinion.

As to those not there discussed which have been filed by the defendant:

1. As to the order of reference. I take it it is not to be disputed that the court may order a reference of any part of an equity cause, whenever, in its opinion, the ends of justice require it and the matter referred can be considered by the master consistently with the rules of pleading and evidence. This order was made by the court in anticipation of the long time necessary to take and state this intricate and

prolonged account, and with the purpose of putting into force the condition and stipulation upon which the judgment against the defendant, taken *pro confesso*, had been vacated, viz.: To speed a cause which sought to enforce a right to an inheritance, the contest as to which had been prolonged far beyond two average human lives, and with respect to which the controlling principles had been settled never to be shaken. The thing as to which the account was directed to be taken was specifically defined, and the rules upon which it was to be taken were clearly set out, in the order of reference.

The only question worthy of any consideration, with reference to such an order, would be whether it was made at a point in the litigation when a reference to the matter committed to the master could be had without prejudice to the rights of the litigants.

The demurrer to the whole bill had been overruled after a very full argument, and the court had announced its opinion, to the effect that that portion of the bill, and that alone, was good, by which the complainant sought to recover from the defendant the rents which she might and would have derived from that part of the Blanc tract from which she had been kept out of possession by the devices of the defendant—through her warrantees who occupied. Leave, accordingly, was given to the defendant to still demur to the rest of the bill, and a reference was directed to ascertain the rents and profits which the complainant would have derived had she been allowed to remain in undisturbed possession. See Decree, March 27, 1880.

This inquiry was just as capable of being conducted at that point in the progress of the cause as after a decree upon the evidence. The complainant, in acting upon the order, incurred the risk of the costs of the reference in case she should obtain no decree upon the evidence when the cause should have been finally submitted. The defendant was in no respect prejudiced, and was deprived of nothing but the opportunity for causing still further delay.

2. As to the exception that the master has not reported

upon certain questions. Nothing was referred to him except to take and state the account of rents and profits as to the tract of land known as the Blanc tract, both those realized and those which might have been acquired with ordinary good management.

3. As to the exception that, in some respects, the master has not correctly located the tract. The court finds that the location adopted by the master is confirmed by the contemporaneous maps offered as exhibits in this cause.

4. As to the exception that the master has carried on the charges for rent after the judgments of eviction.

This exception is founded on a misapprehension. The master's report shows that he charges the defendant with rents only up to the date of eviction, under the Agnelly and Monsseaux judgments, although he has properly continued the allowance of interest upon the rent dues, or amounts of rent, till judgment.

The other exceptions to the master's report on the part of defendant have been considered in the opinion and are overruled. As to the exception to the master's report on the part of the complainant, it is allowed to the extent and for the reasons set forth in the opinion. The additional exception as to the property conveyed to McDonogh, and by him bequeathed to the city of Baltimore, is also founded on a misapprehension. The account is brought down only to 1848, the date of the conveyance from the defendant to McDonogh.

The question remains whether the complainant has substantiated her bill, and, by the proofs, made such a case as to entitle her to a recovery. The complainant's title, that is, her capacity to take, her heirship, her legitimacy, the will, and her right to inherit under it, the entry into possession of this Blanc tract by the defendant; that the defendant in bad faith took her title and sold the property, and received the price, and in all her relations to said property is to be deemed a person dealing in bad faith; that complainant has not renounced her title; and the legal identity of the First Mu-

nicipality and the city of New Orleans, the defendant;— all these facts and issues have been settled beyond question by the supreme court of the United States by a solemn judgment between these parties. See record in suit *Myra Clark Gaines v. City of New Orleans*, No. 2695, and the case as reported, 6 Wall., 642, and 15 Wall., 624.

Under the civil law and the textual provisions of our code, the seller, even in good faith, in case of eviction, is bound

1. For restitution of the price.
2. For a restitution of all fruits and revenues which the vendee is obliged to restore to the owner.
3. For the costs; and
4. For all damages which the vendor has suffered, besides the price paid. Civil Code, arts. 2506, 2507, 2510; *Morris v. Abat*, 9 La., 552, and *Downes v. Scott*, 3 La. An., 278.

The possessor in bad faith is bound to surrender the thing immediately; and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee and to acquit, *i. e.*, discharge for him, his liability to the owner, without suit or condemnation.

He is in law a usurper and liable for his successors. Pothier, Contracts of Sale, No. 127.

The complainant's title being incontrovertibly established as well as the *mala fides* of the defendant, the simple inquiry is, in what manner and to what extent did the defendant delay or hinder restitution, for any delay, much more any hindrance, was a fault.

The testimony shows that in 1836 this complainant first commenced her judicial demands against the First Municipality, in whose place the defendant stands, for this property; that six times she has been compelled to go before the supreme court of the United States, upon an appeal or writ of error, in the prosecution of her efforts to obtain restitution, mediately or immediately, from the defendant; that prior to the year 1855 that tribunal could give no relief, though intimating that they were impressed with the equity of her cause, because she claimed property situated in the state of Louisiana,

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under a will not probated in that state, and from a testator whose will was declared by the probate courts of that state to be a different instrument, and one which excluded the complaint; that thereupon, in 1855, complainant succeeded in obtaining the recognition of the genuine last will and testament of her father from the proper tribunal of this state, and in 1860 her right to inherit and recover under that will was authoritatively admitted and decreed by the supreme court of the United States in the case of *Gaines v. Hennen*, 24 How., 615; that in that case not only was every point established which was material or requisite to entitle the complainant to vindicate her title to this entire tract of land and to recover against this defendant, but the court emphasized its decision by the expression of the hope that opposition to rights so clear and, even then, so unduly resisted, would thereafter cease; that this defendant nevertheless continued her opposition by a defense to the suit of the complainant against the defendant, in which cause, in 1866, the propositions of law and the conclusions as to the facts upon which the case of *Hennen* had been decided were reiterated by the United States supreme court, with this severe rebuke to the defendant: "It was supposed after the decision in *Gaines v. Hennen* that the litigation which had been conducted in one form or another for over thirty years by the complainant, to vindicate her rights in the estate of her father, was ended; but this reasonable expectation has not been realized, for other causes, involving the same issues and pleadings, and upon the same evidence, are now pending before this court" (see *Gaines v. City of New Orleans*, 6 Wall., 642); that the defendant in the year 1867 joined in the institution and prosecution of a suit known as the *Fuentes* suit, in which it was attempted to revoke the decree by which the will of 1813, upon which the complainant's rights rested, had been probated; that upon the suggestion by the defendant of the pendency of this *Fuentes* suit, the circuit court of the United States for this district ordered a stay of proceedings in the causes known

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as the "Agnelly and Monsseaux cases," which had been brought in that court by the complainant against several hundred of actual tenants of this Blanc tract, who were intermediate warrantees of the defendant, to recover possession and fruits; that these possessory suits were thus made to pause till the final decree in the Fuentes case, whereby in May, 1877, the prayer to revoke the probate of the will of 1813 was rejected; that the Fuentes suit, of itself, hindered the complainant in obtaining restitution eight or ten years; that shortly after the decision of the supreme court of the United States in *Gaines v. The City of New Orleans*, numerous parties, tenants upon this Blanc tract, under titles emanating from the defendant, united in a petition addressed to her, in substance asking that the defendant should acquiesce in the demand of the complainant as the rightful owner, make restitution and end a useless and already decided contest; but that the defendant refused to comply with this petition, and, through her counsel and attorney, entered upon and virtually conducted the defense against the demand of the complainant for possession and for the fruits of this tract, pending in the Agnelly and Monsseaux cases; that complainant, in May, 1877, recovered judgments for possession and for partial rents for portions of the time of her dispossession, which judgments, there being no appeal, became final in May, 1879; that the insolvency of the tenants in the Agnelly and Monsseaux cases is established, and that the former holders of titles derived from the defendant, former occupiers of this tract, are either insolvent or dead, without representation, or cannot be found; that in August, 1879, this suit was commenced; that the answer of the defendant herein, among other defenses, denies all title on the part of the complainant to the Blanc tract, denies that the will of Daniel Clark, of 1813, is valid or operative, and the capacity of the complainant to take under it, and her heirship; avers the complete good faith of the defendant; in short, with a temerity amounting to hardihood, presents and urges, as if new and undecided, all the issues which had

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been for so many years controverted between the complainant and defendant, and which were decided adversely to the defendant by the supreme court of the United States in 1860, emphatically reaffirmed adversely to the defendant in her own case in 1867, and decided and practically enforced against the numerous defendants by final judgments in the Agnelly and Monsseaux cases, who were all warrantees of the defendant, who had notice and defended, which, by operation of law, rendered these last decrees also judgments against the defendant herself.

This recital, which is but a summarization of the proceedings and adjudications disclosed by the records in the various causes which constitute the litigation between these parties — this unabating and defiant resistance to rights decreed from the beginning to have been known and thus solemnly and frequently declared — abundantly establishes that from the year 1837 to the year 1879, the defendant, with her large resources and power, by unconscionable proceedings, has kept the complainant from the possession of this property, with no conceivable object save the exhaustion of complainant and the consequent retention as against the defendant's vendees of the \$500,000 which the defendant had in the year 1837 received for this property, and the evasion of her just liability for fruits.

That this is a fault of an aggravated character, the perpetration of which has been persisted in beyond all precedent, cannot be doubted. Civil Code, arts. 2315 and 2324; *Irish v. Wright*, 8 Rob., 428, 432; *Smith v. Berwick*, 12 Rob., 20, 25.

That this wrong has been committed under the guise of judicial proceedings cannot exempt from liability.

He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith,

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must at least consist in placing the injured party in the situation in which he would have been if the disturbance had not taken place. *Gray v. Lowe*, 11 La. An., 391; *Sellick v. Kelly*, 11 Rob., 145; *Horn v. Bayard*, 11 Rob., 259.

The case of *Dyke v. Walker*, 5 La. An., 519, illustrates the extent to which damages are allowed for injury effected by litigation, for there plaintiffs were allowed compensation for being compelled to go to protest and for loss of credit. When a party makes use of judicial procedure in bad faith, he is subjected to a peculiar and severer rule in the assessment of damages.

The liability of a corporation, municipal or other, for the wrongful and injurious acts of its officers and agents when acting within the scope of their authority, or when the corporation has ratified their acts, is, under the law of Louisiana, settled. *McGary v. City of La Fayette*, 4 La. An., 440; *Rabassa v. Orleans Navigation Co.*, 5 La., 461; *Wilde v. City of New Orleans*, 12 La. An., 15, and *Gaines v. City of New Orleans*, 6 Wall., 642.

Nor does it diminish the liability of the defendant that she has, in some instances, conducted and urged these defenses in the capacity of warrantor. The warrantor is, by the settled jurisprudence of this state, the real defendant. *Millaudon v. McDonough*, 18 La., 102, and cases there cited. The defendant had the right, which the evidence shows she exercised with a guilty knowledge, to assume the conduct of the Fuentes case and the defense of the Agnelly and Monsseaux cases, as well as with the same knowledge to procrastinate the accession of the complainant to her estate by the defense of causes where she was the sole party defendant, but by so doing she incurred the liability which rests upon all parties who employ legal process and effect legal hindrance in bad faith and against what are ultimately declared to be the rights of others and to their damage; she must make full reparation.

The case of *Chirac v. Reinicker*, 11 Wheat., 279, is in point, and illustrates the ground of the defendant's liability. In

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that case, in an ejectment suit, there had been a recovery of possession against a tenant, and a party other than the defendant in the reported case had, with the consent of the plaintiff, been admitted to defend as landlord. The court held that, notwithstanding this, if the defendant had derived profit and had aided in resisting the title of the plaintiff and his recovery of possession by employing counsel and defending the suit, he also was liable for mesne profits.

“An actual occupation of the premises by the defendant, during the period for which damages are claimed, is unnecessary; it is sufficient if he was interested in and derived profits from the premises during that period.” Adams on Ejectment, marginal paging 383.

The question as to the amount of damages is twofold, resulting from the double character in which the defendant is liable.

If we view the complainant as simply substituted in equity to the rights which the vendees, warrantees, would have had, the amount to be recovered would be determined by what had been recovered in the Agnelly and Monsseaux cases.

The evidence shows the defendant was called in warranty in some of those cases, and was notified in all; that she took upon herself the defense, and through her attorney conducted it. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought. Civil Code, arts. 2517, 2518, 2519; Code of Practice, arts. 388, 714. The cases of *Vienné v. Harris*, 14 La. An., 382, and *Late v. Armorer*, 14 La. An., 826, establish that judgment against the vendee is, *prima facie*, sufficient to authorize judgment against vendor and warrantor, and that, when the latter has had notice, though he did not appear, the judgment is conclusive against him. See, also, *Johnson v. Wild*, 8 La. An., 126, and *Williams v. Le Blanc*, 14 La. An., 757.

The records in the Agnelly and Monsseaux cases were not only properly introduced as evidence in this case, even with-

out the verification afresh by the witnesses of their testimony, which was also had, but the defendant, having had notice and having appeared, is concluded by the judgments therein rendered both as to the eviction and as to the fruits.

As to the rule to be followed in ascertaining the rents and profits, the court in the order of reference directed the master to take account not only of the rents, revenues and values for use actually received, but also of those which the evidence showed would have been received with ordinary good management. In the *Agnelly and Monsseaux causes*, in response to a request of the masters for instructions upon this point, the court ruled as follows:

“The defendants therefore must, in accordance with the very textual provisions of the law, restore all products of the property which they have possessed. They are also liable for the products which they ought to have realized with ordinary good management. The possessor in bad faith is not held to the highest possible degree of skill and care, but he must have administered as a prudent master of a family. *Winter v. Zacharie*, 6 Rob., 467. This was a cause in which the defendant had wrongfully possessed a plantation, and he was adjudged not only liable for the fruits which he received, but those which he could have received with ordinary husbandry; and the doctrine is laid down in express terms, that the possessor in bad faith must not only restore the fruits received, but also those fruits which with ordinary good management he ought to have received. The case was determined in the first instance after a thorough argument, and an elaborate opinion was written. Upon a rehearing the court reiterated their view, and it is the settled law of Louisiana down to the present time.

“This question has been raised in the reports of both matters, whether the principles already enunciated apply to all lands, improved and unimproved. They apply to all lands, unimproved as well as improved. The complainant is not entitled to a recovery for the revenues which might, by the remotest possibility, have been received by the possessor; on

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the other hand, she is entitled to all income, revenues, profits and value for use or occupation which the evidence establishes she, as owner, would have received or derived, whether the possessor has realized them or not, and whether the failure on his part to realize them resulted from his not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessor, now adjudged to have been unfounded."

This is the doctrine distinctly laid down by Mr. Justice Bradley in *Gaines v. Lizardi* and *Gaines v. New Orleans*, 1 Woods, 104. This is a settled rule of the civil law. The Partidas, Moreau & Carlton's edition, vol. 3, p. 1109, title 14, law 4: "If the possessor held in bad faith and was evicted, he would have been obliged to deliver up the estate, together with all the fruits he had gathered from it; those which he had consumed, and even the rents and fruits which he might have gathered from the estate had he cultivated it, inasmuch as he had no right to possess it, and has acted in bad faith."

Precisely this principle was laid down by the circuit court of the United States for the district of Arkansas, in *Beebe v. Russell*, 19 How., 283, which was an action for fraudulently withholding real estate and for rents and profits. According to the statement of the supreme court in their opinion, wherein they assign their reasons for dismissing the appeal as premature, the circuit court ordered "that the master take an account of rents and profits received, or which could and ought to have been received."

See this principle expounded in Duranton, vol. 16, p. 307, No. 288; Demolombe, vol. 9, p. 96; and MacEldey's Compendium, No. 154. Says Papinian, L. 62, sec. 1, 6 ff. *de rei vindi*: "Generally, when the amount of fruits is being inquired into, we must not consider whether or not the possessor in bad faith has reaped fruits, but whether the complainant (owner) might have reaped fruits if he had been allowed to remain in possession. And this decision is also

approved by Julian." (*Generaliter autem, quum de fructibus æstimandis quæritur, constat adverti debere, non aumalæ fidei possessor fructus sit, sed an petitor frui potuerit, si ei possidere licuisset — quam sententiam Juliaun quoque probat.*) See, also, same author, L. 64, ff. de rei vind.

And Paulus, L. 33, eodem titulo, says: "Not only the fruits that have been gathered, but also those that might have been gathered must be accounted for." (*Fructus non modo percepti, sed et qui percepti honeste potuerunt, æstimandi sunt.*)

1 Du Caurroy, pp. 285, 289, 298, *Instit. de Justinien* (Ed. 1826), says at p. 298: "That the possessor in bad faith must account for all the fruits received, and even for the fruits which, though not received by him, could have been obtained by the owner." Papin, fr. 62, sec. 1, Paul, fr. 33, eod. v. sec. de off. Ind.; 1 Moreau de Montalin, p. 596 (Ed. 1824), and *Analyse des Pandretes de Pothier*.

The common law, as stated in Bracton's "Laws and Customs of England," gives the same rule: "The jurors will diligently inquire what profits the disseizor had received in fruits, rents and other commodities. They were also to estimate the advantages the disseizee might have derived from the estate if he had not been disseized." Stearns on Real Actions, 393.

The amounts already in judgments would establish the limit of recovery if there was nothing but the naked liability flowing from the law of warranty. But there is here another ground of liability on the part of the defendant which is to be considered in connection with, but which exists independent of, the warranty. The warranty gave the defendant her monied interest in defeating and delaying the complainant in the enforcement of her rights. But it is the unjust hindrance which was the cause and is the measure of the damage. For it cannot be that a wrong-doer can so frame the execution of his wrong as to limit his liability short of complete indemnity. The evidence shows that for forty-seven years the city of New Orleans has in bad faith

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kept the complainant out of the possession of her property; that she has done this by using her vast resources, and even her power of annually taxing complainant's property, for keeping in prosecution a gigantic system of litigation, having for its object to prevent the complainant from possessing and enjoying property which the defendant knew, and had been judicially decreed to have known, belonged to complainant.

It is not now as warrantor that we are considering the defendant's conduct, but as a person who, from motives springing from her own advantage, has caused to the complainant pecuniary loss, and that, too, when aware of her own wrongdoing. From this fact a liability springs up which is not necessarily satisfied by the redress given indirectly through the machinery of warranty, *i. e.*, the complainant may recover from the defendant all the loss which she suffered for the entire period during which she has been kept out of possession by the defendant.

Of all the writers on the subject of the obligation to redress wrongs and injuries, none are more discriminating, or consider the matter in broader relations, than Puffendorf in his Law of Nations. He states, book III, chapter 1, section 3, the division of damage by the civilians into *damnum emergens* (loss which one suffers by diminishing his present goods) and *lucrum cessans* (damage which one receives by loss of gain which he might have made).

"All hurt, spoil or diminution of whatever is actually our own, and all interception of what we ought to receive," the same writer says, entitles us to reparation. At section 4 he enumerates those who are responsible for a wrong as comprising those who give any real assistance in the act of damage, or who, by any antecedent motion or default, caused it to be undertaken or who came in for any part of the advantage; to those, he says, must be added all who hinder the duty of restitution. He cites the case of Probus, a prefect who, under the Emperor Valentinian, did nothing but protect his clients in unlawful action, and he was held to be responsible therefor; "for here," says the author, "protection

of a great patron, interposing, hindered them from making good the damage they had been guilty of."

At the common law, at a time when its maxims were but an utterance of the civil law in another tongue, the disseizor was liable for the possession of his grantees and feoffees, and until the statutes of Gloucester and Marlbridge he alone was liable, and after those statutes the tenants were liable to the extent of the insolvency of the disseizor. In construing the statute, it was held that the damages should still be recovered against the disseizor, if he was able to satisfy them. See a summary of the law on this point derived from Bracton in Professor Stearns' Treatise on Real Actions, pp. 389 and 390.

See Pothier, Contract of Sale, Cushing's translation, No. 127.

Now, in this case, the evidence establishes that the tenants have been kept from making restitution, and the complainant from receiving it, solely by the defendant, and it is a case where every day of hindrance added fresh loss to complainant.

It must be that a defendant, clothed with such semi-sovereign powers, alike for repairing or committing injury, must render to this complainant, who, after forty-seven years of resistance, calls it into a court of equity, and shows that it is the author of this deliberately unjust and long continued dispossession, a compensation equal to her established pecuniary loss.

In the light of these twofold liabilities of the defendant, I will consider the master's report as to the revenues which were and could have been derived.

His report enables the court to come to a conclusion on the subject from two distinct processes, sustained by two distinct sources of testimony.

As to the improved property, from an examination of sixty-four different squares and lots, upon the testimony derived largely from the tenants themselves, he shows, after allowing for all expenditures for ameliorations and taxes,

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and interest upon the same, a net income, averaging thirteen per cent. upon seventy per cent. of the price of adjudication at the public auction at which the defendant sold the same in 1837. This of course would be a net annual income of over nine per cent. upon the entire price.

As to the unimproved property, he finds as a fact that it was capable of yielding a revenue from that which so many lots upon the same tract did yield, and states it as at least five per cent. upon seventy per cent. of the adjudicated price at said public sale.

The evidence fully establishes a further fact that the sole reason which prevented the improvement of the unimproved lots was a fear on the part of pretended owners and of the public that the title of the complainant was well founded.

Now, if the improved yielded an annual income of upwards of nine per cent. net, taking the value as the full price of adjudication, and the unimproved would have been improved but for the doubt which the defendant's wrong inspired as to the title, it follows that five per cent. net, at the very lowest, would have been realized, not upon seventy per cent. but upon one hundred per cent. of the price of public adjudication.

The second source of evidence upon this point is the sale upon ground rents of property within the city limits and its suburbs. In forty-nine instances of ground rent reserved by the city, and forty-six other cases of ground rent reserved by Daniel Clark, in most cases for the period of twenty-nine years, some of which still continue, the yearly rent was six per cent. upon the fixed value. The rate at which these ground rents were contemporaneously established and continued, by which the income was fixed for long periods, furnishes a sound, independent standard, and corroborates the inference, drawn from the sixty-four cases into which inquiry was made by the master, that the fructual value was considerably above five per cent. upon the ascertained value of the land.

The case shows a great fact which fortifies the conclusion drawn from these facts found by the master.

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What the value of this Blanc tract should be held to be, when it is regarded as a capital from which an income is to be held to have been derivable, is additionally and independently established by the auction sale of 1837. The adjudication and other evidence show that at the public sale at which the defendant sold these lots, there were upwards of sixty purchasers who had the money to pay the adjudicated price. The city had laid out the Blanc tract with adjoining property into squares and lots, and sixty different persons estimated the value of, and purchased the same at auction.

The concurrence of so many minds as to the value of these lots, thus expressed and recorded, furnishes a criterion as to its productive value, founded upon so many practical judgments, that a court, after a lapse of forty-six years, should not lightly disregard it; certainly not upon the evidence in the record; for the case shows that the complainant commenced her assertion to title to this property by suit against the First Municipality in 1836, and from most of the witnesses, even from those who were defendants themselves, come such statements as to authorize the inference that the value fixed by the public sale of 1837 was prevented from continuing to be the productive value by the doubts which the defendant's unjust pretensions threw upon the title. From this fact alone, then, it might safely be considered as established, and the defendant is estopped from denying, that the use of each lot or parcel of this land was yearly worth five per cent. upon this auction price.

The rate of six per cent. was virtually allowed for the use of such property by the supreme court of this state in the year 1843. See *Erwin v. Greene*, 7 Rob., 175. Vacant lots to the value of several hundred thousand dollars had been sold subject to a mortgage which the vendor agreed to remove. Notes for the price were given, dated at the time of the sale, which was contemporaneous with the period of the public sale here, in 1837, bearing six per cent. interest, which were deposited to be delivered when the mortgage should be canceled. The mortgage was not canceled till 1843. The

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question was whether the vendor should recover six per cent. interest for the time previous to the cancellation of the mortgage? The court answer, "yes," for two reasons; one of which was that the purchaser could have had possession, and that, by the Civil Code of Louisiana, he must pay interest if the property did, in the eye of the law, yield a revenue. The case showed that it was vacant city lots, from which the court inferred it was susceptible of yielding a revenue, "for," says the court, "they could have been rented."

The court ought not to overlook a principle always recognized by the civil authorities, and which is laid down in *Pontchartrain Railroad Company v. Carrollton Railroad*, 11 La. An., 253, that even if the evidence as to the value of the rents had been much less satisfactory than it is, and if an accurate estimate of loss had not been attainable upon such clear and full proofs as are here afforded, the defendant having invaded the rights of complainant, and failing itself to furnish more satisfactory proof, would have to be content with the conclusions to which the court would have been able to arrive from the evidence which had been produced. See, also, *McGary v. City of La Fayette*, *ubi supra*, where the court, in the assessment of compensation, lay great weight upon vexatious and incidental wrongs which have been established.

In short, the burden which bad faith places on the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though through the fault of the defendant it must be derived from facts outside of the receipt of actual rents. For, since the law requires the court, in such a case, to go further, and decide from evidence extrinsic to actual receipts, it must be admitted that a safe guide may be obtained, and in this case has been furnished, from the rents and profits, for the very period in question, shown to have been actually derived from so many other lots, adjacent, similarly situated and

no better capacitated, from numerous ground rents, and from the opinions of such a multitude of purchasers.

This is a peculiar case. It calls a defendant to a reckoning for fifty years of flagrant and already adjudged wrong. The complainant has already recovered possession. The restitution to which the complainant was and is entitled is founded upon decrees between the parties which establish it conclusively. The hindrance on the part of the defendant and the amount of compensation due are fully proven. The bad faith of the defendant has been previously determined and is a thing adjudged. The court must not be deterred, by the magnitude of the amount involved, from the application of settled principles of law and the deduction of conclusions which follow from established facts. The conclusion which must be deduced, after giving all the evidence in this cause its full weight, is that the productive value of the Blanc tract was, in the year 1837, fixed at the public sale, and has not been maintained, but has receded, and has been kept from advancing only by the insecurity as to the title created by the pretensions of the defendant, asserted in bad faith at the outset, and continuously, and persisted in years and years after they had been rejected and even rebuked by the highest tribunal under our government; and that the actual yearly value which could and would have been derived from the lots constituting the same by the complainant, had she been allowed to occupy them without unjust molestation from the defendant, is established to have been at least five per cent. upon the price which they brought when sold by the defendant at public auction in 1837.

The master's account is stated in the precise manner determined to be correct in the case of *Gaines v. The City of New Orleans*, 15 Wall., 634, *i. e.*, he has stated the account with reference to each lot separately, and has ascertained the rent or income which should have been derived each year, and has computed interest at five per cent. upon the same down to January 10, 1881, which point of time he selected for convenience. The master's account shows that the

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total amount of judgments rendered against the warrantees of the defendant in the Agnelly and Monsseaux suits is \$576,707.72. This amount, though less than the evidence shows is requisite to indemnify the complainant, cannot be disturbed. It is, to the extent of the periods covered thereby, binding alike upon the complainant and the defendant. A study of his report and the records of the causes introduced in evidence shows that, when the complainant recovered the land, she recovered rents for only a portion of the period of her dispossession, often a small one, as the tenants had been in occupation only varying fractions of time since 1837. The proof shows that the earlier, intermediate grantees who occupied it, are either insolvent, dead without representatives, or, after search, cannot be found. The balance of the amount, viz., \$1,045,363.78, which is the aggregate of the rents and profits which would, with ordinary good management, have been received from the unimproved lots, *i. e.*, for those periods not covered by the possessory judgments, is derived from a detailed statement of the rents from each lot, the yearly rental being five per cent. upon seventy per cent. of the price of adjudication in 1837. This rate, according to the conclusion of the court, as stated above, is short of what the evidence shows is the true measure of the rent, by thirty per cent., *i. e.*, that the yearly rent, as established by the evidence, is five per cent. upon one hundred per cent. of the full price of adjudication and sale. The correction required is made by adding thirty per cent. of this sum where, as has been said, the computation has been made upon a basis of seventy per cent. The amount to be recovered, therefore, would be as follows:

For improved and unimproved land already in judgments.	\$576,707 92
For balance of rents, unimproved land	1,848,959 91
Total	\$1,925,667 83

For which last amount and the costs which have been taxed in the Agnelly and Monsseaux suits, with interest upon that portion which arises from the yearly sums for rent, from January 10, 1881, the complainant must have a decree.

The Excellent.

THE EXCELLENT.

When loss or damage to goods intrusted to a common carrier is shown, the presumption of law is that it was occasioned by his fault, and the burden is on him to prove that it was occasioned by a cause for which he is not responsible.

ADMIRALTY APPEAL.

Messrs. Joseph P. Horner and Francis W. Baker, for libelants.

Messrs. Ed. W. Huntington and Horace L. Dufour, for claimant.

PARDEE, Circuit Judge. The evidence in this case shows that the libelants' goods were damaged to the extent claimed in the libel while in the possession of respondent as carrier. The evidence is equally clear that the damage resulted from the shifting of a part of the cargo and from leakage. The shifting of the cargo and the leakage were caused by the excessive straining and laboring of the ship, though it would seem that the shifting of the boxes of tin plate was directly attributable to bad stowage. The libelants' evidence shows that the straining and laboring was due largely to the wrong stowage of railroad iron in block in the bottom of the ship. The claimant's evidence tends to show that the cargo was stowed in the usual way for miscellaneous cargo, and that the straining and laboring of the ship was caused by the extremely heavy weather she encountered on the voyage to this port. An analysis of the evidence is not necessary; the preponderance is in favor of the libelants. There is no dispute that the great bulk of the Excellent's cargo was iron and steel and tin, some one thousand two hundred and twenty tons, and that this was all stored in the bottom of the ship; the iron rails (some seven hundred and thirty tons) being stowed first in block, fore and aft, and locked together. And there can be no doubt that such storage increased the labor and strain of the ship in the heavy weather encountered during the voyage. The very best

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claim that can be made from the evidence in favor of claimant is that the whole evidence leaves the matter in doubt as to the real cause of the damage. The loss or damage in this case being established — and the evidence is clear on that, — the presumption of the law is that it was occasioned by the fault of the carrier, and the burden is on him to show that it was occasioned by a cause for which he is not responsible. The carrier has not shown that the damage was caused solely by the heavy weather, as he claims, or that he was excusable.

A decree should go for the libelants to the same effect as that rendered in the district court, with interest from judicial demand.

In this case I have consulted Stevens on Stowage to advantage.

THE LORD DERBY.

1. A watch dog, part of the cargo of a ship, and known to the master to be likely to bite strangers, was, with the consent of the master and owners of the ship, chained under a table in the cabin. *Held*, that the master and owners were guilty of negligence in placing the dog there, and that the ship was liable *in rem* to a person who, being lawfully in the cabin, was bitten by the dog.
2. Damages allowed by the district court will not be increased or diminished by the circuit court where no additional testimony has been taken, unless the injustice of the allowance is manifest.

ADMIRALTY APPEAL.

By the knowledge and consent of the master and owners of the steamship Lord Derby, a dog was shipped on board her for transportation from Europe to America as part of the cargo, and was chained under a table in the cabin. The libellant, having been bitten by the dog, filed his libel against the ship to recover for the damages sustained thereby. Other facts are stated in the opinion of the court.

The Lord Derby.

Mr. E. Howard McCaleb, for libelant.

Messrs. J. Carroll Payne and Henry Denis, for claimants.

PARDEE, Circuit Judge. The questions presented in this case are: *First*. Is the proceeding properly brought against the ship? *Second*. Was there negligence on the part of those in charge of the ship in caring for the dog, resulting in the injuries to libelant? *Third*. What damages, if any, shall libelant recover?

1. It is contended that the case, as presented in the libel, shows a case of assault and battery, which, under the sixteenth admiralty rule, "shall be *in personam* only." The ingenuity which suggested the point has not failed to supply the court with an ingenious argument to support it. This definition is given of assault and battery, as taken from 3 East (*Leame v. Bray*), 591:

"Whenever one wilfully or *negligently* puts in motion a force, the direct result of which is an injury, it constitutes an assault and battery, and the action brought should be *trespass vi et armis*."

An examination of the case shows that the brief goes further than the authority cited. The question before the court was whether the action was properly brought in trespass, and all the judges agreed that where an injury results directly from force, trespass lies, but nothing is said of assault and battery. The other cases cited (*Gibbons v. Pepper*, 1 Ld. Raym., 38; *Blackman v. Simmons*, 3 Car. & P., 138) are also cases of trespass. An assault and battery is where one intentionally inflicts unlawful violence upon another, and if there is a case in the books which goes further than this, it is an unsafe case to follow. That there may be such gross negligence that an intent to injure may be inferred therefrom, may be conceded, and perhaps *Blackman v. Simmons*, *supra*, shows such gross negligence; but the case made by the libel does not show such negligence, nor does it bring such negligence home to any particular

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individual, as would be necessary in a case of assault and battery.

In my opinion the case made in the libel is very far from a case of "assaulting and beating," within the sixteenth admiralty rule. And the case, as disclosed by the evidence, seems to me to be a clear case of liability on the part of the ship. The dog inflicting the injuries on libelant was brought over on the ship, with the consent of the master and owners, to be disposed of in this port. It was part of the cargo. The libelant was lawfully on board as pilot, and entitled to be carried safely. An injury to him from carelessness, or negligence in handling or caring for the dog, would entitle him to remuneration from the ship, the same as if his injuries had resulted from goods falling on him, or from defective spars or rigging.

2. The evidence shows that the dog was a large, powerful animal, suspected of a disposition to bite strangers generally, and known to be of a good watch-dog breed, likely, when chained, to bite any stranger coming within his tether, and attempting to interfere with things under his guard. This is the character that claimant's witnesses give the dog. The libelant's evidence, and several conceded circumstances, go to show that the dog was ferocious, and that the master well knew his dangerous character and disposition. But it is not necessary to go further than the conceded character of the dog. Taking that as stated, it was negligence to chain him up under the cabin table, where he was concealed, because the cabin was the place where the libelant had been assigned to sleep, had slept, where his baggage was placed, and where he had a right to go, and did go, for it.

Very able arguments and briefs have been submitted as to the responsibility arising for injuries inflicted by domestic animals like dogs; whether they must be known to bite, or wont to bite, before the owner is responsible; and whether there is a difference between the common law and civil law on the subject. But I do not find it necessary to go into the law, being satisfied that enough was known of this par-

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ticular dog's inclinations and disposition to satisfy the most liberal rule claimed, unless it should be claimed that a dog must actually have bitten somebody before he can have a character, and the owner can be held responsible.

3. The evidence in this case shows that the libelant was seriously bitten in the calf of the leg, with several slight wounds, but one deep one, which really caused pain, sickness and danger. He went under treatment and got along well for about four days, when he felt able to and did return to his usual business, making one trip as pilot to the mouth of the river. On his return from this trip his leg swelled, his pains increased, paroxysms followed, and for a time he was threatened with lock-jaw. This relapse kept him confined for several weeks, and at the taking of his evidence he had not fully recovered. The evidence of the doctors shows that his early attempt to resume work resulted in protracting his confinement and increasing his sufferings. The district court assessed damages, including loss of time, nursing, medicines, doctors' fees, and suffering, at \$2,500. This allowance is vigorously combated here as excessive, as judicial liberality, etc.

The point is urged that it was gross negligence on the part of libelant to return to work so soon, and before his wounds had entirely healed, and that his negligence aggravated his injuries and increased the extent of damages, and that for this aggravation and increase he cannot recover. The attempt to return to work too early made by the libelant was certainly unwise and injurious, but I am not prepared to call it gross negligence. The doctor did not recommend it; neither did he forbid it, as he says himself: "I consented to his going, which certainly was a mistake." As it appears to me, it was an unwise step, taken with the commendable desire on the part of a workingman to resume the labor on which he had to rely to support his family. The doctor did not know until after the event that it was unwise; neither did the libelant. So, on this point, I agree with claimants as to the law, but I reject the conclusion of negligence as claimed.

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See Sherman, Neg., ¶ 35. The bite of a dog particularly in this climate, is a very serious matter outside of the actual pain and suffering experienced. The dangers of lock-jaw and the fear of hydrophobia are added to the mental and nervous sufferings attendant upon such injuries; and, as the evidence shows, they were experienced by the libelant in this case. To many people the shock to the system resulting from the most insignificant bite of a dog drawing blood is such that no money compensation is adequate. The ghost of hydrophobia is raised, not to down during the life-time of the victim.

On the whole case, while I am not prepared to say that I would have made the same allowance as the district judge has, had the case come before me originally, I now see no good reason to vary the amount. When no additional testimony is taken, the circuit court will not hastily disturb a decree on the point of damages, nor unless it shows manifest injustice. See *Cushman v. Ryan*, 1 Story, 91; *The Narragansett*, 1 Blatchf., 211; *Taylor v. Harwood*, Taney's Dec., 437.

In *Cushman v. Ryan*, *supra*, Justice Story says:

"In cases of this nature, where the damages are necessarily uncertain, and are incapable of being ascertained by any precise rule, and therefore unavoidably rest in a great measure in the exercise of a sound discretion by the court, upon all the circumstances in evidence at the hearing, it is with extreme reluctance that the appellate court entertains any appeal, and it expects the appellant to show, beyond any reasonable doubt, that there has been some clear mistake or error of the court below, either in promulgating an incorrect rule of law or in awarding excessive damages, or that new evidence is offered which materially changes the original aspect of the case."

A decree will be entered for the libelant in the same terms as in the court below.

Olafin v. Lisso.

CLAFLIN AND OTHERS v. LISSO AND OTHERS.

Where judgment creditors had filed their bill in the circuit court to subject to the payment of their debt a judgment recovered by their debtors against a third person, and process had been served upon all the defendants, and an injunction allowed forbidding the payment or collection of said judgment, but no receiver had been appointed: *Held*, that the complainants thereby acquired a lien in equity upon the judgment recovered by their debtors, which could not be affected by subsequent proceedings against the latter under the state insolvent laws.

IN EQUITY. Final hearing.

The complainants had recovered a judgment on the law side of the court against the defendants Lisso & Scheen, and an execution issued thereon had been returned unsatisfied. Thereupon they filed this bill against their judgment debtors and Bertha M. Lisso, Jerry H. Beaird, and others, whereby they sought to subject to the payment of their judgment against Lisso & Scheen a judgment recovered by Lisso & Scheen in the district court of the parish of Caddo against Beaird. The bill alleged that the defendant Bertha M. Lisso claimed to be the transferee and owner of the judgment last recovered, but charged that the transfer was fraudulent and void. An injunction restraining the payment or collection of the judgment against Beaird was allowed, but a motion for the appointment of a receiver was overruled. In May, 1880, after all the defendants had been served with process, Lisso & Scheen were, under the state law and by the state court, declared insolvent, and one Chaffe was appointed syndic of their estate. Chaffe was made a party defendant to the bill, and filed a cross-bill in which he claimed the judgment recovered by Lisso & Scheen against Beaird.

Messrs. John H. Kennard, W. W. Howe and S. S. Prentiss, for complainants.

Messrs. T. L. Bayne and J. C. Egan, for defendants.

PARDEE, Circuit Judge. There is no dispute as to the facts in this case, and it is not necessary to recapitulate them

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in order that my views may be understood. Under the creditors' bill in this case the complainants would be entitled to a decree subjecting the judgment described in the bill to the payment of their judgment almost as a "matter of course." The question now presented is whether the insolvency proceedings under the state law can have such operation as to defeat the rights and advantages of complainants as acquired by their bill, its service, and the injunction accompanying. They acquired "a lien in equity" upon the judgment; they made an "equitable levy" upon it. *Miller v. Sherry*, 2 Wall., 237; *Weed v. Pierce*, 9 Cow., 722; *George v. Williamson*, 26 Mo., 190; *Lyon v. Robbins*, 46 Ill., 276; *Dargan v. Waring*, 11 Ala. (N. S.), 988; *Pool v. Ragland's Adm'r*, 57 Ala., 414; *Townsend v. Miller*, 7 La. An., 632; *Decuir v. Veazey*, 8 La. An., 453; 2 Sandf. Ch., 494; Rev. Civil Code La., art. 1977.

Now it seems to be well settled that the jurisdiction of the United States courts, previously acquired, cannot be ousted by proceedings in insolvency under state laws, when the parties invoking the jurisdiction have not participated in the insolvency proceedings. *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank of Tennessee v. Jolly's Adm'rs*, 18 How., 507; *Green's Adm'x v. Creighton*, 23 How., 90. But it is claimed that, as no receiver was appointed, the court did not take possession of the *res*, and that, therefore, although complainants may have a lien on the equitable asset, yet by virtue of the insolvency it passed into the hands of the state court, whose possession cannot be divested. It is well understood that where a state court has lawfully obtained possession of property no federal court will interfere to divest that possession. And this is what is said so well in the case of *Levi v. Columbia Life Ins. Co.*, 1 McCrary, 34 (*S. C.*, 1 Fed. Rep., 206), relied upon by counsel for syndic in this present case. Judge McCrary says, after reviewing the authorities:

"Hence the broad principle remains, . . . that whatever tribunal, state or federal, lawfully has possession

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of the *res* of an estate, it shall proceed to the full administration thereof, without interference by another tribunal."

The point in this case is, not whether the state court under the insolvency proceedings became vested with the possession and control of all the surrendering debtors' assets, but whether, by virtue of the previous proceedings in this court, this court had or not jurisdiction and control of the particular asset, the Beaird judgment. If it had, the subsequent insolvency proceedings could not divest that jurisdiction and possession. We have seen *supra* the effect of the proceedings here. An equitable levy had been made on the judgment. Notice to Beaird and to the pretended claimants, and to Lisso & Scheen, the debtors of complainants, had been given directly, and to all the rest of the world constructively, of such levy, and, so far as possible under the circumstances attendant, the asset had been taken into the possession of the court. Only constructive possession could be taken in such a case. Only a constructive possession can now be claimed for the state court and its officer, the syndic. How the appointment of a receiver would have aided the possession of the court in such a case I am unable to see. Had the property been susceptible of transfer and removal, a receiver might have been able to prevent it; but such is not the case. The fact is, Lisso & Scheen had been enjoined from disposing of or transferring the judgment, and Beaird, who owed the amount, had been brought into court with full notice. The hands of the court were on the property as fully as if a receiver had been appointed and the judgment had been ordered assigned to him.

The case of *Townsend v. Miller*, 7 La. An., 632, was very like the present case, so far as the facts go. Pending the proceedings to reduce an alleged fraudulent judgment in favor of the debtor's wife, the debtor made a surrender of his property, which was accepted by the judge, and a syndic appointed. When this syndic claimed the fruits of the creditor's vigilance, the supreme court said: "We know of no rule of law which would deprive the plaintiffs of the full

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benefit of their judgment; there is certainly no principle of justice which would justify such a course on the part of the court." And in the present case I can see no justice in allowing the tardy surrender of the debtor, after the complainants' rights were fixed, to defeat the demands of complainants and deprive them of the just reward of their vigilance. I have examined the numerous authorities cited for the cross-complainant, but I find none of them to support his pretensions. The numerous New York cases referred to which come nearest to sustaining the proposition that the court only takes possession of the equitable assets sought to be reached by the appointment of a receiver, seem to be effected by the statutes of the state regulating creditors' bills, and do not appear to be controlled by general equity principles.

I conclude, on the whole case, that the complainants should have a decree subjecting the Beaird judgment to the payment of their demand, and that the cross-bill of Christopher Chaffe, so far as said judgment is concerned, should be dismissed.

A decree to that effect will be entered.

THE ORIENT.

1. A vessel is seaworthy when her hull, tackle, apparel and furniture are in such condition of strength and soundness as to resist the ordinary action of the sea, wind and waves during the contemplated voyage.
2. When a vessel was shown to have been seaworthy for the two years next preceding the voyage on which she was wrecked, and she was wrecked in a cyclone of great violence, *held*, that the burden was cast on the insurers to prove her unseaworthy.
3. A policy of insurance upon a vessel bound to New Orleans, which was her home port, contained these clauses, the first written, and the second printed:

"To navigate the Atlantic ocean, between Europe and America, to be covered in port and at sea."

"Warranted by the assured not to use port or ports in eastern Mexico, Texas nor Yucatan, nor anchorage thereof, during the con-

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tinuance of this insurance, nor ports of the West India islands between July 15th and October 15th."

Held, that the policy covered the loss of the vessel in the Gulf of Mexico, the conduct of the insurers showing such to be their construction of the policy.

ADMIRALTY APPEAL.

Messrs. Richard De Gray, J. R. Beckwith, Charles B. Singleton and Richard H. Browne, for libelants.

Messrs. Thomas H. Kennedy, Joseph P. Hornor and Francis W. Baker, for defendants.

PARDEE, Circuit Judge. There are two questions of fact in this case upon which the parties differ: (1) Was the *Orient seaworthy* when she left the port of Liverpool on the voyage during which she was insured? (2) Was she *seaworthy* when she sailed from Ship Island on the voyage during which she was wrecked and lost? Seaworthy, in the sense used, means in such a condition of strength and soundness as to resist the ordinary action of the sea, wind and waves during the contemplated voyage. A ship is seaworthy in this sense when her hull, tackle, apparel and furniture are in such a condition of soundness and strength as to withstand the ordinary action of the sea and weather. See *Dupont de Nemours & Co. v. Vance et al.*, 19 How., 162; *Bullard v. The Roger Williams Insurance Co.*, 1 Curt., 148.

"It is sufficient on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to *ordinary* perils—the underwriters are bound as to the extraordinary perils." *Watson v. Insurance Co. of North America*, 2 Wash. C. C., 480.

And in the same case it was held:

"In considering the evidence of seaworthiness, when a rational ground is laid, as in this case, for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage; and more especially where, as in this case, the former condition of the vessel, for the two preceding years, is proved to be that of a sound and seaworthy vessel, the burden of proof is thrown upon the underwriters to prove satisfactorily to the jury that

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she was not seaworthy, and sufficiently strong to perform the voyage."

In this case of the Orient it is established beyond controversy that the Orient was sound and seaworthy for more than two years preceding, and that she was wrecked in a cyclone or storm of terrific force. The burden of proof is, therefore, upon the insurers to establish satisfactorily the alleged unseaworthiness of the Orient at the times alleged. The unseaworthiness alleged at Liverpool relates to the mizzen-mast, which is said to have been affected with dry rot to such an extent as to render it insufficient in strength to withstand the ordinary perils of the sea. The evidence offered on this point the testimony of several gentlemen that ten months afterwards the stump of the mast showed that when it went overboard it broke nearly square off, and that the stump further showed that at the time of examination it was three-fourths affected with dry rot.

No satisfactory evidence was offered to show the rapidity or slowness with which dry rot affects timber, and the experts disagreed as to the kind of timber of which the mast was made. Against this showing it is proved that as late as the ship was inspected by the respondent's surveyor, in May following the policy, even as late as the ship sailed on her last voyage in September, there was no apparent rot about the mast, and that the mast stood well on the voyage from Liverpool to New Orleans, and on her last voyage withstood, without faltering, the unprecedented storm in which the ship was lost until her topsail was split or blown away, until the ship was thrown on her beam ends, and then until the rigging was purposely cut to send the mast overboard. Considering that the mizzen-mast is the least supported of any mast aboard the ship, as the braces run forward and the mast cannot be supported aft like the fore and main masts, and considering that the mizzen-mast in the Orient stood all the strains shown, and finally had to be cut away, it is asking too much, on a theory of dry rot and the opinion of unscientific experts, to ask a court to find such a mast not

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sufficiently staunch and strong to withstand the ordinary perils of the sea. Dry rotted, as proctors claim, it would hardly have stood under the weight of its own spars, and would certainly have gone over the bows on the first breath of wind when its sails were set.

The unseaworthiness alleged at Ship Island, at the time the last voyage was entered upon, is in relation to the mizzen-mast and the leaky condition of the ship. As I have considered the matter of the mizzen-mast, that may be considered out of the question. The same may be said of the grounding of the ship on the bar when first towed out of Ship Island harbor, for the ship has been brought back to this port, and now lies in the river, all of which is shown in the record, an unanswerable witness to the fact that such grounding did not impair the seaworthiness of the hull, thus overthrowing all conclusions and theories that by terrific pounding on the sand-bar her bottom was injured, so as to cause her to leak to such an extent that it was dangerous to send her to sea. The ship's condition to-day is a vindication of the board of survey that convened aboard her after the grounding, and of the report made by the diver, Burris, of the results of his examination following. The leakage, then, at Ship Island is reduced to the cause which the libellant admits: the opening of the upper seams in the ship's sides, caused by the lying in this climate waiting for cargo, and loading, from June to September. The amount of this leakage is the only inquiry open for serious dispute.

The respondent has produced the evidence of fourteen witnesses,—all of the crew,—who, in the main, swear to excessive leaking, and to extensive pumping before and after the ship sailed. An analysis of their testimony shows that except Franz, the carpenter, none of them sounded the pumps or had any accurate idea of the water the ship was making, and their statements are so conflicting and their *animus* so evident, that, outside of the facts of the ship's leaking and their pumping, very little light is obtained from them. The witness Franz had an opportunity to know the

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condition of the ship, and his first evidence was that the ship made thirty-six inches in twenty-four hours, and his corrected evidence was that she made thirty-six inches in twelve hours. The witness Nesbit says that at the time of sailing the ship made thirty-six to thirty-eight inches in twelve hours, but he never sounded the pumps, and, aside from his position as second mate, there is no reason to infer that he knew any more of the actual leakage of the ship than any other seaman on the ship. As to the pumping actually done, no man can take the statements of these fourteen witnesses and reach a conclusion that should settle any rights in a court of justice. On the other side are produced the stevedore, whose men pumped the ship while she was loading, his deputy, who kept the time at the pumps, the surveyor of the timber which was put aboard, the first mate, and the master of the ship. They all had opportunity to know the facts about which they testified, and their statements are intelligent. From them it appears that the ship made considerable water through her upper seams: according to the master, thirty to thirty-two inches in twelve hours; according to the mate, thirty-six inches in twelve hours. This amount corresponds with the corrected statement of Franz, the carpenter.

It may, then, be taken as an established fact that when the ship got her full cargo her upper seams were opened from the heat, and that through those seams she took in water so as to show three inches per hour in her pump-wells. The question now is whether such leakage rendered the ship unseaworthy. A number of experts, ship captains and others, have given opinions. The weight of these opinions and the common sense of the matter is, that where a ship's seams are opened from being out of the water, and exposed to the air in a hot climate, that loading the ship down so as to cover the seams with water will soon cause them to close by the swelling of the timbers, and that a leakage from such cause is not unusual, and, when within the control of the ship's pumps, does not affect the ship's seaworthiness. This was practi-

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cally the case of the Orient. An effort has been made to prove that the leakage of the Orient was unusual and dangerous, and beyond the control of her pumps. It has failed; the weight of evidence is the other way. Again, it has been argued that her water-logged condition aided her wreck in the cyclone. The reliable evidence in the case is that she was pumped dry at midnight; that the second mate said she was kept so during the mid watch; and that the storm struck her about four o'clock in the morning. Aside from the burden of proof being on the respondent, I am affirmatively satisfied, from all the evidence in this case, that when the Orient sailed on her last voyage she was in such a condition of strength and soundness in her hull, apparel, tackle and furniture as to render her capable of resisting and withstanding the ordinary action and perils of the sea, winds and waves for and during the voyage contemplated.

There remains in the case a question of law and fact to be determined; it is whether the policy of insurance covers risks and losses in the Gulf of Mexico. That it was the intention of the assured and the understanding of the company to cover such risks and loss is hardly to be disputed. This was the home port of the vessel, to which she was bound when the policy issued, and from and to this port has she been voyaging for several years, during which time the company has been receiving premiums from the owners, and the latter have been confiding in the sufficiency of their policies. Whenever the ship visited this port, the surveyor of the company has inspected and reported her condition. When the ship's loss in the gulf was reported in this city, before any demand was made on the company, the company, assuming its responsibility under its policy, filed a bill to perpetuate testimony as to the means of loss, to meet the demand for insurance that it knew would be made. And in the salvage case, long after a full knowledge of all the facts as to the loss and the abandonment had been made to the company, the company intervened in the salvage proceedings

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to ask that a separate sale of ship and cargo might be made for the protection and interest of the owners.

The policy, so far as it bears on this point, reads:

"To navigate the Atlantic ocean between Europe and America; to be covered in port and at sea."

This clause is written by hand in one of the otherwise blank spaces in the policy.

"Warranted by the assured not to use port or ports in eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance. Nor ports in the West India islands, between July 15th and October 15th."

This clause is one of the printed clauses in the policy.

This latter clause shows from the contract itself, that it was the intention and understanding, if not direct agreement, of the company that the insurance should cover the Gulf of Mexico, else why was the warranty required? The rule invoked, that written clauses in a contract control printed clauses, prevails only so far as there is a conflict between them. *Goicoechea v. Louisiana State Ins. Co.*, 9 Mart. (N. S.), 27; *Wallace v. Ins. Co.*, 4 La., 289; *Seton v. The Delaware Insurance Co.*, 2 Wash. C. C., 175.

So far as there is any conflict between these clauses let the writing prevail; but for all that, the latter clause was in full force between the parties, and it goes to show that the parties understood that the terms "To navigate the Atlantic ocean between Europe and America" covered the Gulf of Mexico.

Geographically the Atlantic ocean is that branch of the general ocean which separates the continents of Europe and Africa from America. See Amer. Ency. and Chamb. Ency., *verbo* "Atlantic ocean." The Gulf of Mexico is a basin of the Atlantic ocean inclosed by the United States, the West Indies and Mexico. See Amer. Ency., *verbo* "Gulf of Mexico;" Chamb., *id.* A gulf is usually an arm of the sea which seems to have encroached upon the land, such as the Gulf of Mexico, etc. See Mitchell's Modern Geography. "Gulf, an arm of the ocean." Ency. Britt.

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"All the gulfs, all the inland seas, form only portions detached, but not entirely separated, from that universal sea denominated the ocean." First Ency. of Geography, 187. "Gulf; an arm or part of the sea;" "Mexico, Gulf of; a large bay or gulf of the Atlantic." See Rees, Ency., vols. 16 and 24.

If the Gulf of Mexico is "an arm of the Atlantic ocean;" "a basin of the Atlantic ocean;" "a part or portion of the Atlantic ocean,"—it would seem not so very extravagant to hold that, in a contract where the intention of the parties run that way, it is covered by the general term "Atlantic ocean."

In Wood on Fire Ins., § 498, it is said that "conditions or restrictions contained in a policy may be considered waived by a knowledge on the part of the insurer of facts inconsistent therewith. In such cases the insurer may be estopped to insist upon the condition." See, also, *United States v. Hunter*, 15 Fed. Rep., 712. "Another rule of law, just as well settled, is that the obligation of a contract is what the parties intended to mean when they entered into it. What they both understood to be the contract, that is the contract; and to arrive at the understanding of the parties, the courts are authorized to look at the circumstances which surrounded them when they made it." *Van Epps v. Walsh*, 1 Woods, 598.

For all these reasons of law and of fact, it seems that this last question must also be disposed of adversely to the respondent. On the whole case I have no doubt that the libellants are entitled to recover the full amount of the policy, and a decree will be entered to that effect, and for interest at five per cent. from January 4, 1883, and all costs.

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MERCHANTS' NATIONAL BANK OF NEW YORK V. BROWN.

A party sought to remove a cause pending in a state court on the ground of the citizenship of the parties, which did not appear either by the petition for removal or by the record, but appeared for the first time in a petition for *certiorari* filed in the United States court after trial and judgment in the state court. *Held*, that the latter court had properly refused to surrender its jurisdiction, and that upon the filing of the record in the United States court, the proceedings should be dismissed.

Heard on motion to remand.

Mr. E. Howard McCaleb, for plaintiff.

Mr. John Ray, for defendant.

PARDEE, Circuit Judge. In this case the court notices from the record and supplemental record the following proceedings in the state court:

(1) That a judgment by default was entered against defendant on the 10th day of February, 1883; (2) that the petition for removal was presented and filed on the 13th day of February, 1883, and the application refused on the same day; (3) a final judgment was rendered confirming the default, February 14, 1883; (4) an answer, pleading the general denial, was filed February 15, 1883, but without setting aside the default or the final judgment of confirmation rendered the day previous; (5) on the 15th of February a motion for a new trial was made; (6) on the 20th of February, 1883, the petition for *certiorari* was presented to this court, the order issued, and on the 22d of February, 1883, this petition was filed. In this petition for *certiorari*, presented and filed after the trial of the cause and rendition of judgment in the state court, is the first averment of the defendant's citizenship.

It is admitted that neither in the record nor in the petition for removal is there any averment whatever of defendant's citizenship, showing that either (1) at the time of the commencement of the action, or (2) at the time of the application for removal, she was a citizen of a different state from the

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plaintiff. *Beede v. Cheeney*, 5 Fed. Rep., 388; *Kaiser v. Ill. Cent. R. Co.*, 6 Fed. Rep., 1; *Smith v. Horton*, 7 Fed. Rep., 270; *Sherman v. Windsor Manuf'g Co.*, 11 Fed. Rep., 852. The petition for removal must aver that the parties are citizens of another state; an averment that they are residents of another state is not sufficient. *Parker v. Overman*, 18 How., 137; *Bingham v. Cabot*, 3 Dall., 382; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagon*, 2 Cranch, 9.

It being conceded that the requisite showing not having been made either in the petition for removal or in the record, it is clear that the state court properly refused to surrender its jurisdiction on the facts and pleadings appearing before it.

"This right of removal is statutory. Before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended. . . . This certainly is not stating affirmatively that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause." *Insurance Co. v. Pechner*, 95 U. S., 183.

"Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal until, at least, a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes." *Amory v. Amory*, 95 U. S., 186.

"A petition for the removal of suit from a state court to a federal court is insufficient, unless it sets forth in due form,

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such as is required in good pleading, the essential facts not otherwise appearing in the case, which, under the act of congress, are conditions precedent to the change of jurisdiction." *Gold Washing & Water Co. v. Keyes*, 96 U. S., 199.

"We fully recognize the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." *Removal Cases*, 100 U. S., 457.

As the jurisdiction of the state court has never been lawfully divested, it follows that this court has never acquired jurisdiction.

The case has never been removed from the state court to this court. It cannot, therefore, be remanded, but all proceedings in this court should be dismissed, and such an order will be entered, with costs.

EDWARD L. COPE AND OTHERS V. THE VALLETTE DRY DOCK COMPANY.

A floating dry dock, which was a wooden box which had been securely and permanently fastened for fourteen years to the bank of a navigable stream, which was used solely for the purpose of docking vessels for inspection and repair, which had no means of self-propulsion, and was practically incapable of being navigated, could not be the subject of salvage services, and a libel therefor against the owner would not lie in the admiralty.

(Before WOODS and PARDEE, JJ.)

ADMIRALTY APPEAL.

The facts found by the circuit court were substantially as follows:

The Vallette dry dock was the property of the Vallette Dry Dock Company.

It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box, constructed mainly of wood, with a flat bottom, and perpendicular, or

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nearly perpendicular, sides. In the year 1866 it had been put in position, by being permanently moored by means of large chains, to the right (Algiers) bank of the Mississippi river, in the fifth district of the city of New Orleans, and it was sparred off from the bank by means of spars to keep it afloat, and had so remained until December 15, 1881. It was used in the following manner: When it was desired to dock a steamboat or other water craft, the dry dock was sunk by letting in water until the craft to be docked could be floated into the dry dock. The latter was then raised by pumping the water out, leaving the docked boat or vessel in a position to be inspected and repaired. The dry dock was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam or otherwise. The dry dock was not designed for navigation, and could not be practically used therefor.

On December 15, 1881, a steamship ran into the Vallette dry dock and broke a hole in its side, extending below the water line, and the dry dock began to fill and to sink.

The steam tugs Col. L. Aspinwall and Joseph Cooper, their officers and crews, went to the rescue of the dry dock, and by the use of their steam pumps saved it from sinking, and so lightened it that its owners were able to close the hole in its side made by the steamship, and it was thereby rescued from peril.

The libel was filed by the owners and officers and crews of the steam tugs against the Vallette Dry Dock Company, *in personam*, to recover salvage for their said services.

All the parties were citizens of the state of Louisiana.

Messrs. J. R. Beckwith and C. S. Rice, for libelants.

Mr. M. M. Cohen, for respondent.

Woods, Circuit Justice. Upon the finding of facts, the question is presented whether the services rendered by the libelants to the Vallette Dry Dock Company were of such a nature as to give the district court and this court, sitting as

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admiralty courts, jurisdiction over this case. We are of opinion that the services did not partake of the nature of salvage services. The structure to which they were rendered was not designed for navigation, and was practically incapable of navigation. It had no more connection with trade and commerce than a wharf, a ship-yard or a fixed dry dock, into which water craft are introduced by being drawn up on ways. As shown by the findings, it had remained securely and permanently moored to the bank for a period of fourteen years. It partook more of the nature of a fixture attached to the realty than of a boat or ship.

A service is not necessarily a maritime service because rendered upon the high seas or a navigable river. It must be a maritime service; it must have some relation to commerce or navigation; some connection with a vessel employed in trade, with her equipment, her preservation, or the preservation of her cargo or crew. *Thackarey v. The Farmer*, Gilp., 524. So in the case of *The Steamboat Hendrick Hudson*, when the hulk of a dismantled steamboat, fitted up as a hotel and saloon, had got ashore, and it became necessary to lighten her by pumping, and a steam propeller was employed for that purpose, whose owners afterwards filed a libel for salvage, it was held that the hulk was not at the time engaged in commerce and navigation in such a sense as to be liable *in rem* in admiralty. 3 Ben., 419.

A case in all respects similar to the present one was decided by Mr. Dillon, lately circuit judge for the eighth circuit. We refer to the case of *The Salvor Wrecking Company v. The Sectional Dock Company*, in the United States circuit court for the eastern district of Missouri. It has not been reported, but we have been furnished with a copy of the opinion delivered. It was a suit *in personam* to recover for salvage services for raising docks similar to the Vallette dry dock, which, without breaking away from the shore or parting the cables, had sunk so deep that they could not be raised by their own pumps. It was held that the services did not relate to navigation business, or commerce of the

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sea, or public navigable waters, in such a sense as to make the services maritime, and the libel was dismissed for want of jurisdiction.

The cases cited by counsel for libelants are cases of property found floating at sea, or wrecked, or washed upon the shore. *Taber v. Janny*, 1 Sprague, 315; *50,000 Feet of Timber*, 2 Low., 64; *A Raft of Spars*, 1 Abb. Adm., 485; *23 Bales of Cotton*, 9 Ben., 48. Other cases cited refer to salvage services rendered boats of different kinds. *The Old Natchez*, 9 Fed. Rep., 476; *Maltby v. A Steam Derrick-Boat*, 3 Hughes, 477; *The Senator*, Brown's Adm. Rep., 372; *The Union Express*, id., 516.

These cases are not in conflict with the views we have expressed.

Our conclusion is, that neither the district nor this court has jurisdiction of this case, and the libel must therefore be dismissed.

PARDEE, Circuit Judge, concurred.

CITIZENS' INSURANCE COMPANY AND OTHERS v. THE KOUNTZ LINE AND OTHERS.

1. Where the owners of several steamboats are not in fact partners, and neither own nor use them in common, and there is no community of profits, but they allow their boats to be advertised as forming a line under a common name, and employ a common agent, who solicits custom and transacts business for all the boats, *held*, that no one of the boats or its owner is liable for the contracts or torts of the others.
2. The bill of lading issued to a shipper by one of the boats composing such line, made out in her own name, is notice, and amounts to a contract that the boat by which it was issued should be alone bound.

(Before WOODS and PARDEE, JJ.)

ADMIRALTY APPEAL.

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Woods, Circuit Justice. The suit was brought *in personam* against the Kountz Line, the H. C. Yeager Transportation Company, the C. V. Kountz Transportation Company, the K. P. Kountz Transportation Company and the M. Messe Transportation Company. These respondents were all incorporated companies organized under the laws of the state of Missouri. The findings of fact show that they were distinct and independent corporate bodies, each owning in severalty its own property, carrying on its own business, without any sharing of profits by the other companies, the only connection between them being that there were some persons who held stock in all the companies, and that the Kountz line was the common agent of all the other companies. There was no evidence or finding to show that these several companies had ever agreed to form a partnership with each other, and no facts are shown or found from which a partnership between them could be inferred. It is sought, however, to charge them with a joint liability because, it is alleged, they held themselves out or suffered themselves to be held out to the public as forming a combination in the nature of a partnership, or as being jointly bound for the contracts, misfeasances and negligences of each other.

We think nothing is disclosed by the record which sustains this contention of the libelants. The most that the findings establish is that the boats of the several transportation companies had formed a line or combination to run in connection with each other and under the management of a common agent, and the existence and the superior advantages offered by this line were advertised in various ways. But nothing appears either in the evidence or the findings of fact which would justify any shipper or passenger in supposing that these several corporations held or suffered themselves to be held out as jointly bound for the contracts of each other, or that each one would become an insurer for the performance of the contracts or for the diligence and good conduct of the others.

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This question is therefore presented: Where the owners of several steamboats are not in fact partners, and own and use no property in common, and there is no community of profits, but they allow their boats to be advertised as forming a line under a common name, and have a common agent, who advertises and solicits custom and transacts business for all, is every boat and owner jointly liable with the other boats and their owners for their contracts and torts? We are of opinion that this question should be answered in the negative. In support of this view the following authorities are in point: *Insurance Co. v. Railroad Co.*, 104 U. S., 146; *Irvin v. Nashville, etc., Railway Co.*, 92 Ill., 103; *Briggs v. Vanderbilt*, 19 Barb., 222; *Bonsteel v. Vanderbilt*, 21 Barb., 26.

There can be no well founded contention in this case that the libelants, or those under whom they claim, were deceived, for the bills of lading issued by the Henry C. Yeager were made out in her own name, and amounted to notice to the shippers, and was a contract with them that the Henry C. Yeager and her owners, the H. C. Yeager Transportation Company, were alone bound.

We are, therefore, of opinion that there was no joint liability of the respondents, or any of them, and that the libel should be dismissed.

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Where property is seized by a judicial process which carries with it a *jus in re*, as between creditor and debtor, the destruction of the property, without fault of the debtor, works a payment of the debt to the extent of its value.

ACTION AT LAW.

The steamer Flavilla was seized by the United States marshal by virtue of an admiralty warrant issued to him by the district court. A default was taken and decrees

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were rendered in favor of the original libellant and certain intervenors for debts due them respectively from the boat, which were liens thereon, and amounted in the aggregate to more than her value. The boat was condemned to be sold to satisfy the decrees, and an order of sale was issued. Pending proceedings under this order, and while the boat was in possession of the marshal, she sank and became a wreck, and was sold under the writ for a small sum. Thereupon the owner of the boat brought this suit against the marshal to recover her value. The defendant filed an exception to the petition on the ground that it set forth no cause of action against him.

Mr. W. F. Mellen, for plaintiff.

Mr. J. R. Beckwith, for defendant.

BILLINGS, District Judge. This cause having been heretofore submitted upon the peremptory exception to the petition and amended petition, and the same having been duly considered by the court, the court declares:

1. That it appears that the vessel, which is alleged to have been the property of the plaintiff, for the destruction of which damages are sought to be recovered, had been seized under a proceeding *in rem*, and that the claims of the libellants and the intervenors in said proceeding, which were asserted in and upon said vessel, were largely in excess of the value of said vessel as stated by the petitioner; and that it is not stated in said petition that there was any value to said vessel above the amount of said claims so made and binding; nor is it denied that all of said claims were valid.

2. That where a *res* is seized by a judicial process for a debt, which carries with it a *jus in re*, as between debtor and creditor, the maxim *domino perit res* means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding, and unite, so to speak, in the seizure, also asserting claims which carry with them liens, the destruction of the

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property without fault of the debtor works a payment of their respective claims to the extent of the value of the property destroyed in the order of the priority of their claims; that the destruction of the debtor's property, under such circumstances, operates as a payment up to its value precisely as would its sale and the application of its proceeds.

3. And, consequently, that unless there was a residuum of value over and above the valid claims rightfully interposed against the *res*, it perished for the owners of them, and its destruction worked no injury and gave no right of action to the plaintiff.

It is therefore ordered, adjudged and decreed that the said peremptory exception is good and valid in law; that it be maintained; and that the petition herein be dismissed at the cost of the plaintiff.

WESTERN DISTRICT OF LOUISIANA.

ALEXANDRIA, JUNE TERM, 1882.

SAWYER V. PARISH OF CONCORDIA.

1. The courts of the United States have jurisdiction of a suit between citizens of the same state without regard to the defenses set up, or to be set up, in the answer, which, upon the face of the petition, is one arising under the constitution or laws of the United States.
2. When the plaintiff in a court of the United States insists in his petition that an act of the state legislature impairs the obligation of the contract in which his suit is brought, and is therefore void, the fact that the state supreme court has held the act to be unconstitutional and void does not oust the jurisdiction of the United States courts.

Heard on exception to the jurisdiction. The case is stated in the opinion of the court.

Mr. W. W. Farmer, for plaintiff.

Messrs. Chas. J. Boatner and M. J. Liddell, for defendant.

BOARMAN, District Judge. The plaintiff, a lawyer and citizen of Louisiana, sues the parish of Concordia for \$27,000, claimed to be due to him because of certain professional services rendered the defendant, in pursuance of a conditional contract of date December, 1872. He alleges that he completed his part of the agreement before October, A. D. 1879, and that on the happening of the suspensive condition his contract became absolute and indefeasible; that by operation of law his contract has a retroactive effect, and takes date with the agreement — December, 1872. At that time he alleges the existence of two statutes of the state which gave him remedies for the legal and effectual enforcement of his contract, to wit, the act, No. 69, A. D. 1869, and section 2743, Rev. St. 1870.

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The act, No. 69, provides substantially as follows: That the judge rendering a judgment against any parish shall order the tax-assessing officers of the defendant parish to assess a special tax in amount sufficient to pay the judgment creditor; that said tax shall be forthwith collected and held as a special fund for the benefit of such creditor, and shall not be otherwise diverted; provided there are no other funds subject to such judgment in the parish treasury. The act, or section 2743, authorized the parishes in the state to levy and collect such taxes as may be deemed necessary by parish authorities to defray the expenses of the local government.

Having cited these two acts, he alleges that act No. 96, A. D. 1877, repealed them. This act limits the power of the parish so that not more than ten mills can be collected for any purpose, and repeals all general laws authorizing the levy of any *special* or *judgment* taxes. In addition to the repealing statutes, he alleges that article 209 of the state constitution of 1879 limits the parish tax to one per centum on the assessment, and that the sum annually collected in the parish is used and needed for the alimentary purposes of the parochial government, and will furnish nothing with which to pay his claims; that said parish has no funds on hand, and no property subject to seizure.

He alleges that the powers and remedies the courts of the state had and would have exercised, under act No. 69 and section 2743, for the enforcement of the obligation of this contract, have been destroyed and taken away by the enactment of the subsequent acts and article of the state constitution; that these acts, No. 69 and section 2743, *now repealed*, entered into and were vital elements in his contract; that the state has by these subsequent repealing laws impaired the obligations of his contract, contrary to article I, § 10, of the constitution of the United States. He avers that his suit arises under the constitution of the United States. Defendant denies the jurisdiction of this court. His motion is now under consideration.

He urges that "plaintiff and defendant are citizens of the

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same state, and that plaintiff's demand and alleged contract, if any exists, can be enforced in the courts of the state of Louisiana under act No. 69, A. D. 1869; that said act, and remedy therein provided, was not repealed by act No. 96, 1877, nor by the provisions of the constitution of 1879.

After stating so much by way of denying jurisdiction, he adds in his motion that "it is the well-settled jurisprudence of the state that these repealing acts and article of the constitution do not affect the remedy or rights of parties under contracts entered into, as plaintiff's was, before the passage of act No. 96, 1877, or before the constitution of 1879." To sustain the suggestions in his motion he cites a number of cases reported in the Louisiana Reports. They will be noticed later. Defendant's objection to this court's jurisdiction, if confined to the suggestions in his motion, is very limited, and if the question was tried on an admission of all he says, it is doubtful if any circuit court would refuse jurisdiction to try plaintiff's suit since the passage of the act of congress of March 3, A. D. 1875.

He denies that act No. 69, so far as it affects the legal rights of the plaintiff, claiming, as he does, under a contract, has been repealed; that the state courts, while allowing the repealing act of 1877 to fatally affect all persons not claiming under an anterior contract, will protect plaintiff from any loss of right or remedy in consequence of the repeal.

The fact of the repeal cannot be denied. The act, No. 69, certainly did exist as an operative law in A. D. 1872, and it is equally clear that act No. 96, 1877, destroyed the remedies and powers under act No. 69, 1869, and section 2743 of Revised Statutes. The act, No. 96, 1877, limits and greatly reduces the per centum of taxation that the parish of Concordia could collect when plaintiff entered into his contract with defendant. The municipal law of the state which binds the parties to perform their agreement constitutes the obligation of a contract. These laws, existing at the time of the contract, must govern and control the contract in every shape in which it is intended they should bear on it,

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whether they affect the validity or construction of the contract.

The jurisdiction of this court cannot be tested, as it applies to this case, by the jurisprudence of the state courts, however much in the cases cited they may have sought to restrain the effect of the state statutes, enacted subsequently to the date of plaintiff's contract. The state courts, of course, have ample power to try this case, or any other suits involving an interpretation of their statutes or constitution, and before the act of March 3, 1875, had original jurisdiction over such cases as this, to the exclusion of the federal courts. It is now conceded that that act is constitutional, and that congress intended under its operation to extend to the circuit courts of the United States all the judicial power which congress could, under the constitution, confer on such courts. The act enables this court to try, concurrently with the state courts, all suits of a civil nature, at common law or in equity, involving over \$500, "arising under the constitution or laws of the United States." Before the passage of the act of 1875 the supreme court only could, under its appellate power, examine and revise the decisions of the highest state courts when they, in a final judgment, passed on a "title, right, privilege or immunity specially set up or claimed by either party under the constitution of the United States."

In such cases, when the judgment was against the title, right or privilege, the cause could go up on writ of error to the supreme court. Now it is no longer necessary, in order to reach the federal court, that a suitor, setting up any such right or privilege, should begin his action in the state courts. Such a right, privilege or immunity makes up a federal question, and if his suit involves such a question he may begin it in this court.

The act of March 3, 1875, made some radical changes in the practice and jurisdictional powers of the circuit courts. The effect and extent of the change has not been fully realized, nor has the act, as yet, been comprehensively interpreted by the supreme court. One of the objects of the act,

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obviously, was to open the circuit courts to suitors claiming rights under the federal constitution and laws, and to enable such litigants to reach the courts of the United States without the tedious and oftentimes difficult process of an appeal on writ of error to the supreme court. May it not be a fact that all suits involving a federal question, which, prior to the act of 1875, could have been taken up on writ of error from the state courts of last resort to the supreme court, may now be filed and tried originally in the circuit courts? Certainly the counsel favoring this motion has fallen far short in his estimate of the changes made by this act of 1875.

It must be admitted as true that plaintiff entered into the contract as alleged; that act No. 69, giving him certain remedies, and section 2743, Rev. St., existed at the date of his agreement; that the act, No. 96, 1877, and article 209 of state constitution, repealed the two statutes, No. 69 and section 2743. The motion to the jurisdiction cannot put at issue these facts as plaintiff alleges them. The constitution of the United States prohibits the impairment of the obligation of a contract. It does not, in such a way, protect the obligation of an ordinary debt.

If his cause of action was to enforce the collection of an account or an ordinary debt, then the allegation that certain laws affecting his remedy had been repealed would not present a federal question. His right to sue in this court attaches at once if he has presented such a question. It must depend on the subject matter of his suit.

In *Osborn v. The Bank of the United States*, 9 Wheat., 738, the court says the right to sue "is anterior to the defense, and must depend on the state of things when the action is brought." Can his right to sue depend on anything else? If the jurisdiction depends on or could be ousted by the character of the defense, or was limited by the denials in defendant's answer, should he file one, or by the matter or facts he should choose to put at issue, then it is apparent that the ingenuity of counsel would have much to do with confirming or denying jurisdiction. If it depended on the juris-

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prudence of the state courts, on similar issues to those involved in the case at bar, the power in this court to try such cases as this one would often rest on the opinions of the state judges. In this connection, it was suggested that defendant's answer, when filed, might admit the execution of the contract agreement, and put at issue only the question of performances on Sawyer's part. Then, on this limited issue, no federal question would have to be passed on, adversely or otherwise, by any court trying the case. This suggestion is answered in case of *Railroad Company v. Mississippi*, 102 U. S., 135, and in a number of cases of recent date. In the case noted the court said, speaking of the matter of jurisdiction:

"It is not sufficient to exclude the jurisdiction of the judicial power of the United States from a particular case that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question, to which the judicial power is extended by the constitution, forms an ingredient of the original cause, it is within the power of congress to give the circuit court jurisdiction, although other questions of fact may be involved in it."

In *The Mayor v. Cooper*, 6 Wall., 247, the court, discussing the same question, said:

"Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exists — if there be a single such ingredient in the mass — it is sufficient. That element is decisive upon the subject of jurisdiction."

Chief Justice Waite, in the case of *Gold Washing & Water Co. v. Keyes*, 96 U. S., 199, said:

"The suit must, at least in part, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved."

In *Osborn v. Bank of the United States*, *ubi supra*, it is said the case arises under the constitution when "the title or right set up by the party may be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction."

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It is clear that a federal question, or the ingredient of one, would not have to be passed on if plaintiff was suing on an obligation growing out of a debt or an account. But he sues on a contract, and invokes the protection of the constitution; and it seems that no exigible judgment could be given in his favor on any of the issues involved, unless the court pronouncing judgment should construe, one way or another, the article of the constitution prohibiting the impairment of the obligation of a contract. The repealing acts and article of the state constitution which have impaired his remedies must be annulled and put at naught, so far as they affect anterior contracts, before any exigible judgment can be given to plaintiff.

The original cause of action consists of a demand for the enforcement of the contract, and of a demand for an exigible judgment for the money due him. The "title or right he sets up for such a judgment cannot" be passed on without recognizing an existing "controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved." Unless an exigible judgment can be obtained, his suit in the state court would be an idle formula and a vain ceremony. Execution is the very life of a judgment; and now, under the act of 1875, he has a right to go into a court that has the power to give him an exigible judgment on all parts of his claim, if well founded.

The Louisiana cases cited by defendant's counsel show the existence of a distinctive constitutional question in this case. In the case of *Folsom v. City of New Orleans*, 32 La. An., 709, the court said, speaking of the repealing act, No. 96, 1877, and of the effect of article 209, state constitution, that "no court has the right to question the validity of any article of a state constitution, except on the ground that it violates the constitution of the United States."

In the other cases the same principle was announced, and in all the cases the court held that act No. 69 was repealed, and that act No. 96, 1877, and article 209, would be valid against everybody but for the restraining effect which this

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construction of the paramount law exercised upon the validity of the act, No. 69, and article 209. In all the cases cited it is apparent that the state court was constrained to recognize the existence of a constitutional question, and to give judgment accordingly. In all of these suits, where a contract was established, the courts protected the claimants, on the ground that, in their opinion, the statute of 1877 and article 209 of state constitution violate the constitution of the United States. Plaintiff can, if he chooses, institute his suit in the state court, and all the elements of the cause of action, if well founded, could be sustained by an exigible judgment; but it is equally as clear to me that no exigible judgment could, in any court, state or federal, be given to him, unless the laws of which he complains as affecting his remedy are declared void, as against him, because of their repugnancy to the constitution of the United States.

I think the jurisdiction of this court covers the subject matter of his suit.

Exception overruled.

ALEXANDRIA, JUNE TERM, 1883.

HOLLINGSWORTH V. THE PARISH OF TENSAS

1. The courts of the United States are bound to follow the decisions of the state courts only when they are based on the laws of the state which "fix rights to things intraterritorial in their nature, or which fix rules of property."
2. According to the principles of general jurisprudence, private property cannot be taken or damaged for public use without compensation, either by authority of the police powers of the state, or under the right of eminent domain.
3. When land has been appropriated to the public use, so that physically, and in law, the owner is excluded from its dominion or beneficial uses, it is "taken or damaged," within the meaning of the rule above stated.

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Heard on exception to the petition; the ground of the exception being that the petition did not state a cause of action against the defendant.

Mr. W. R. Young, for plaintiff.

Messrs. W. W. Farmer and T. P. Clinton, for defendant.

BOARMAN, District Judge. The petition shows that plaintiff is the owner of land adjacent to the Mississippi river, in the parish of Tensas. The defendant, a parochial corporation, caused a levee to be constructed on her land, a distance from the river front and behind her dwelling, store-house and other houses. She alleges that she has been damaged substantially as follows: That in 1880 the police jury of Tensas parish, by an arbitrary and wanton abuse of the powers conferred on them by law, and upon the pretext of constructing a new levee, abandoned the old one, by which her plantation was protected from overflow, and constructed a line of levee on the back lands of her plantation, at a distance of a mile from the river front; that for the construction of this new levee about fifty acres of plaintiff's land, worth \$4,000, was taken and damaged, against her protest and consent, without notice to her, and without the compensation provided for in article 159, state constitution; that between the new levee and the old one, on the river front, about two hundred and fifty acres of valuable land, worth \$25,000, was thrown or left out, and exposed to the aggressions and damages of the overflows; that the new levee cuts off and damages the natural drainage of her plantations, and renders much of the land valueless and unfit for cultivation; that she owns a public river landing, and has a store-house at or near it; that in consequence of the location and building of the new levee, this landing and store are often inaccessible to the neighboring people who trade there; that by the action of the police jury herein complained of, she has been deprived of all protection afforded her by the public levee system of the state, to carry on which she is annually taxed, and a great portion of her plantation is exposed to yearly overflows; that the

rain-water drainage having been damaged and destroyed by the new levee, her plantation is greatly damaged in value and for cultivation; that without such new levee her lands were exempt from overflow except at long intervals.

In the argument the defendant claims that the law imposes a service for building levees on all lands adjacent to the Mississippi river; that in constructing the levee this service has been exercised only to the extent and in the manner provided by law, and the damage alleged is *damnum absque injuria*.

Defendant cites several articles of the Civil Code, and relies for relief particularly upon articles 660 and 661, and the subsequent levee laws:

Art. 660. "Services imposed by law are established either for public utility or for the utility of individuals."

Art. 661. "Services imposed for public or common utility relate to the space which is to be left for public use by the adjacent proprietors on the shores of navigable rivers, and for making and repairing levees, roads, and other public or common works. All that relates to this kind of servitude is determined by laws and particular regulations."

Defendant claims that certain laws relating to "this kind of servitude" are now operative laws in this state. If so, it is not essential that they should now be quoted.

For convenience I shall quote several articles of the code which relate to the subject matter of this action:

Art. 2604, Civil Code. "The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses, under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, whenever it becomes necessary for the general use."

Art. 2605, Civil Code. "If the owner of a thing necessary for the general use refuses to yield it, or demands an exorbitant price, he may be divested of the property by the authority of law."

Art. 2606, Civil Code. "In all cases a fair price should be

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given to the owner for the thing of which he is dispossessed."

Art. 489, Civil Code. "No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, and in a manner previously prescribed by law."

Art. 2294, Civil Code. "Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it."

Art. 156, Const. La., A. D. 1879. "Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

Defendant insists that I should, on the trial of this exception or demurrer, follow the decisions of the state courts, and cites especially the decision in the case of *Bass v. State of Louisiana*, 34 La. An., 494. Strong analogies are apparent between this and that case; but my views of that case, as well as of the several others cited by counsel, or rather my opinion of the character of the law upon which these cases seem to have been decided, forbids me to adopt the persuasive suggestion. These decisions do not impress me with the belief that the issues decided by them are such as may be determined by interpreting and giving effect only to laws of a strictly local nature. To me it appears that the court in the *Bass Case*—and, as this is presented as the strongest case, I shall now refer only to it—was engaged in giving effect to general principles of law, and especially to the powers of a legislature to authorize private property to be taken or damaged, or its use appropriated, without compensation, for public purposes, under the police or other implied powers of government. In trials at law the national courts are required, substantially, to follow the decisions of the state courts in cases where the laws apply. These decisions do not make the laws; but they are considered the best evidence of what the law is in a state where the decisions cited "show a case of statutory construction."

The rule adhered to by the supreme court seems to be that

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section 34, judiciary act 1789, should be observed only where the decisions cited were or are based on the statutes or laws of a state which "fix rights to things intraterritorial in their nature, or which fix rules of property." *Yates v. Milwaukee*, 10 Wall., 497; *Swift v. Tyson*, 16 Pet., 1; *Watson v. Tarpley*, 18 How., 517; *Delmar v. Insurance Co.*, 14 Wall., 661; *Town of Venice v. Murdock*, 92 U. S., 494. With this rule in view, I will further consider defendant's suggestion. Defendant claims that the state, in articles 660 and 661, Civil Code La., and subsequent levee laws, has imposed a service, in the interest of public utility, on all lands adjacent to navigable rivers, and that now such lands may be taken or damaged, or their use appropriated, for the construction of levees, without compensation. It may be that these articles of the code, which can hardly be said of themselves to impose any service on such lands, have been supplemented by subsequent levee laws which impose the service claimed by the defendant. But if they do, in law, burden plaintiff's lands with such service, I think no court could give the effect claimed — that is, that land may be taken or damaged for public purposes, so as to divest the owner of its use, profits and dominion, without compensation — without passing upon general principles of law and jurisprudence which define what sort of a use is a public use; without passing upon the effect, if it has any, of the article 156 of the constitution of 1879; upon what is a "taking" or damaging in the meaning of the law; upon whether or not to damage land by constructing artificial works which, under parochial levee regulations, and in their physical nature, must depose the owner from all use or profits of the land, is a damaging or "taking" which is prohibited without compensation; and without passing upon other questions akin to these, which can be judicially determined only by a resort, on the part of any court trying the case, to general reasoning and legal analogies common to the several states. In the *Bass Case* plaintiff put at issue, not the right of the legislature to pass articles 660, 661, Civil Code, and supple-

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mental statutes; not the right to take or burden his land in such a way; not the right to dispossess or damage him for the general use,—but he put at issue, above every thing and question, the right to take or dispossess him of his land and its uses, without compensation, under the lawful exercise of any power in the state government.

This paramount issue was met and decided adversely to Bass. Could any court have decided this issue for or against him without passing upon the laws and analogies of jurisprudence which concern such public interests as cannot be determined by local laws?

Upon this point I must conclude that whatever may be the nature or extent of the powers or laws upon which the state court refused to allow Bass damages, or whatever may have been the method, compass, or basis of reasoning which lead the court to hold practically that Bass had no cause of action for an invasion of rights protected, as I think, by natural equity, the law of the land, and by the articles of the code herein cited, I think it must be conceded that such a conclusion was not reached by the court's consideration only of a statutory case, or giving effect to local laws. Feeling free from the restraint suggested, I shall now consider whether the petition shows a cause of action for this court to hear.

It is said that, under the lawful exercise of the police powers inherent in the state, the legislature may authorize the construction of levees, and land for their construction may be taken or appropriated, as in this case, without compensation therefor, and the complaining owner cannot be heard to dispute the authority of the officers building the levee, or dispute the necessity for the levee, or the necessity for public use of the particular space of land, nor can he be heard when he alleges wanton injury, and prays the court to control prudentially, for all interests, the officers in their right to take land, even though they should choose to run the levee a distance away from "the space which is to be left by adjacent proprietors on the shores of navigable rivers." It is said that this was substantially announced in the

Bass Case, where the rules and maxims of law regulating society and property rights, and the principles of government from which the police powers are deduced, were discussed at length by the learned chief justice of the state court. In that case many authorities are cited to show that the police powers afford "solid foundation" for articles 660 and 661, Civil Code. No one, I suppose, will deny the sufficiency or solidity of the foundation.

In this case now before the court the property alleged to be taken is a riparian right. The supreme court, discussing such property, say, in *Yates v. Milwaukee*, 10 Wall., 497:

"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

Clearly, it is a property right in the civil as well as in the common law; and if there is an implied exception against its protection in the laws of Louisiana, such an exception should be made as manifest to this court as the protection to all property is expressed in the articles of the code and constitution herein cited.

In Louisiana, as well as in all the states, the implied powers are sufficient to warrant the imposition of this service on lands adjacent to the navigable rivers, and the imposition of such service may be the offspring of a wise public policy; but does it follow that there is, in the state or federal system, any power outside of and apart from the eminent domain right to lawfully, by direct or implied legislation, take any private property, or take the use of it, or so damage it as to deprive the owner of its use or profits, with or without compensation?

The United States supreme court, in *The West River Bridge Co. v. Dix*, 6 How., 532, says:

"That in every political sovereign community there in-

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heres, necessarily, the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. . . . This power, denominated the *eminent domain* of the state, is, as its name imports, paramount to all private rights vested under the government, . . . and must yield, in every instance, to its proper exercise. . . . In fact, the whole policy of the country relative to roads, mills, bridges and canals rests upon this single power, under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed."

The same court, discussing the same principles (91 U. S., 367):

"No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. . . . The right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law."

It is observable that the right of eminent domain and the police powers, though well-recognized attributes of political sovereignty, are distinctive in the purpose and extent for which the legislature may exercise them, and neither is ever free from the restraints or limitations of the fundamental laws. Laws passed under a proper exercise of these respective powers have often been considered by the federal courts, and their distinctive purposes and application recognized. To some extent these courts differ as to the basis of the eminent domain right,—some of the decisions citing the power as resting on political necessity; some on the tenure of lands and implied compact; but I think no federal authority can be cited as a precedent for taking or appropriating the use and control of private property under any other power, expressed or implied, than "this single principle" of eminent domain, upon which it is well known that the policy of the country in relation to public works rests in one state as well as in another. *West River Bridge Co. v. Dix, ubi supra.*

These courts have uniformly held that the police power is

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a different "prerogative power," and extends only to regulating the owner's use and dominion of private property, not to taking from him or dispossessing him of its use and control.

In a case where the city of Richmond prohibited, by ordinance, a railway company to use its locomotives in the streets to move and remove trains, the supreme court (96 U. S., 521) said: "The appropriate regulation of the use (by the owner) is not taking within the meaning of the constitutional prohibition."

The company in that case continued to use its railway track on the streets, but to run the locomotives in the city's streets was considered a noxious use on the part of the owner of its own property rights, and they were prohibited.

Dillon, Mun. Corp., § 93, discussing the same question, says:

"These police powers rest upon the maxim '*salus populi est suprema lex.*' This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from the owner, but a salutary restraint on the noxious use by the owner contrary to the maxim '*sic utere ut alienum non lædas.*'"

Both of these powers are equally clear in the common law; but neither of them can be said to warrant the legislature in imposing, directly or impliedly, without compensation, such an easement or servitude as defendant herein claims. The supreme court having held in the case of *Pumpelly v. Green Bay Co.*, 13 Wall., 166, that the taking of property in the meaning of the prohibition clause in the Wisconsin constitution, similar in language to article 156, was sufficiently established to warrant indemnity where it was shown that any "artificial structure was placed on the land, so as to effectually destroy or impair its usefulness to its owner," or when it was shown that plaintiff's land was covered with water in consequence of the back water from a mill-dam, which was built according to state statute, went on to say:

"We do not think it necessary to consume time in proving that when the United States . . . parts with the fee, by patent, without reservation, it retains no right to take

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that land for public use without just compensation; nor does it confer such a right on the state within which it lies; and that absolute ownership . . . is not varied by the fact that it borders on a navigable stream."

This is the common law doctrine as to easements, and this decision and others, notably the case of *Eaton v. Boston C. & M. R. Co.*, 51 N. H., 504, establishes the law as to what amounts to a taking of private property under the common law rule, which is emphasized in article 156, State Const., 1879.

In the New Hampshire case, cited with approval in 13 Wall., 166, a railway company, acting under legislative authority, caused the removal of a natural barrier which had previously completely protected plaintiff's land from freshets in the river close by. In consequence of the railway's removal of the barrier, the water sometimes overflowed the meadows, carrying stones, sand and gravel upon plaintiff's land. Under this showing, the court held it was such a taking by the railway as the legislature could not authorize without providing for compensation.

The decisions of the several states, so far as I have had an opportunity to examine them, are uniform in the opinion that to constitute a taking there must be some direct, actual, physical interference with, or disturbance of, the lands or chattels. Now, if no such service is known to the common law, can such a servitude as is exacted by defendant be imposed by statute under any implied power peculiar to Louisiana and her system of laws?

The defendant, in *Pumpelly's Case*, claimed that the Green Bay Company had an implied easement on Pumpelly's land in favor of improving the Fox river, and Pumpelly could not complain if his land was overflowed by the company's dam, it having been built according to law, and no compensation was due him. The court refused to maintain the view that any such easement was implied in violation of the constitutional prohibition, and clearly intimates that Pumpelly's land would have been protected from such an injury or dam-

age by the common law, in the absence of any such constitutional prohibition.

The supreme court of New Jersey, in *Sinnickson v. Johnson*, 2 Har. (N. J. Law), 129, says of the right to take private property:

"This power to take private property reaches back of the constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

This was said in vindication of the protection afforded in the common law at a time when New Jersey had no prohibitive clause like article 156 of our constitution. Chancellor Kent, in *Gardner v. Village of Newburgh*, 2 Johns. Ch., 162, maintained the same view as to the common law protection of private property in New York, in the absence of such a clause in the state constitution. In addition to English authority, he cites continental jurists to show that they all lay it down as a clear principle of natural equity, that the individual whose property is sacrificed for public purposes must be indemnified. Mr. Justice Miller cites these last two cases in his opinion in the Pumpelly suit, to show what amounts to a taking; but they are further instructive on the question as to whether an easement, for the enjoyment of which private property must be taken or damaged, may be imposed by statutory implication, in the face of the common law rule, whether written or unwritten, in the laws or constitution of the state.

In the New Jersey case defendant had been authorized by statute to build a dam across a stream to improve navigation, and thereby the water was pushed back on plaintiff's land. Defendant claimed, in consequence of being authorized by law to build the dam in a certain way, he had an implied easement on the lower land, which received the overflow. This was denied by the court, and he had to pay damages. Chancellor Kent granted an injunction preventing the diver-

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sion of water from plaintiff's land, over which was the natural flow, because the legislature authorizing the public work made no provision for compensation.

These cases show that no provision for compensation having been made, no such easement was implied in the statutes authorizing the public work; that the injury in each case was considered as taking private property for public use, and cannot, under such circumstances, be treated only as a consequential injury, not warranting indemnity.

In law, strictly speaking, land is not property, and, though it may be damaged, it cannot be taken; but the right to possess it, its uses and profits, to control and dispose of it, and its beneficial uses, at will, is property. These rights are created, defined and protected by rules of law. A common law regulation of conduct of trade or business may be changed or annulled by legislative will, as well in Louisiana as elsewhere; but these rights of property in land cannot be changed or annulled, under any power of government, so as to destroy or impair them, or their beneficial uses, in violation of constitutional limitation.

In Louisiana the law is called the civil law. Its code says, "Law is the solemn expression of legislative will;" but does it follow that the implied powers to be exercised by "legislative will" are different in their nature or extent from those under which legislation may be rightfully exercised in Wisconsin? The property which is known as the riparian right is the land lying next to the river front, designated in articles 660 and 661, Civil Code, as "the space which is to be left for public use." This space is to be left "on the shores of navigable rivers;" but it has no definite limits or dimensions fixed in the code, and this fact of itself suggests strong reasons why the court should discuss and fix limits to the undefined space, when an unwilling owner invokes the protection of the law against the riparian use or right being taken, or its beneficial use damaged, in pursuance of any claim to an implied easement.

The articles of the code cited herein for plaintiff's protec-

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tion announce well known rules for the protection of property at common law, and since they are a part of the system of laws in Louisiana, before denying plaintiff a cause of action it should be made clear that such property rights as we are now discussing are impliedly or directly excepted from the protection warranted in these articles and rules of law. To me it seems clear that if I should conclude that she cannot recover, admitting her allegations to be true, it will follow, as of course, that the court indorses one of two views: *First*, that her land, though it has been appropriated to the public use, so that physically and in law she has been excluded from its dominion and beneficial uses, has not been "taken nor damaged," in the meaning of the common law rule, emphasized in article 156, Const. 1879; *second*, that such a taking as she alleges can be and has been provided for by the legislature, in enacting the levee laws of the state, under a proper exercise of the police power, or some power other than the eminent domain. I am unwilling to assent to either view. To the first, because a taking, or what amounts to such a taking in law, can — at least in the absence of any statute defining a taking — be judicially determined only by a resort to the general reasoning and legal analogies which we find in the jurisprudence to which these common law rules properly belong. References to such jurisprudence show that an actual physical disturbance of or interference with land, so as to damage its beneficial uses, is a taking which is prohibited. As to the second, aside from the reasonable doubt whether a public use, or the necessity for the use, or what amounts to a public use, can be conclusively determined by legislative will, so that judicial inquiry would be precluded, I do not think "private property may be taken for public use, under the general police power of the state, without compensation therefor," as was held in the *Bass Case*, or that it may be taken for public use under the exercise of any other power than "this single principle" of eminent domain, which in all cases carries with it just indemnity.

Article 156 of the constitution of 1879, appearing for the

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first time in A. D. 1845 in this state's constitution, has been emphasized in all the subsequent constitutions, until now we find its meaning and prohibitive effect enlarged by the additional inhibition against damaging private property without compensation. The article from the beginning has meant something, and these additional words "nor damage" are too significant to be considered only as an idle and purposeless contribution to the organic law regulating and protecting property. It is not clear at all to me that the property right, for the protection of which it is now invoked, is, by any statutory implication, excepted from the pale of this protection, whatever the power may be under which articles 660 and 661, Civil Code, and subsequent laws, may have been enacted.

Plaintiff shows a cause of action which should be heard and passed upon by this court, and the exception is overruled.

EASTERN DISTRICT OF TEXAS.

MARCH TERM, 1880.

D. G. HITCHCOCK & Co. v. THE GALVESTON WHARF COMPANY, GARNISHEE.

1. Courts of law have and habitually exercise control over their own process, so as to prevent injustice and oppression.
2. When stock in an incorporated company standing in the name of a judgment debtor is by law not subject to execution, or is held by the debtor in trust, a court of law will not order a sale of the stock upon a writ of garnishment, and thus compel a resort to a court of equity to restrain the sale.
3. A city claimed title to a portion of the water front of its harbor by virtue of an act of the legislature, and its title thereto had been affirmed by the supreme court of the state. It claimed another portion by virtue of the dedication of the original proprietors. A litigation between the city and an incorporated wharf company touching the title to the harbor front was compromised by a consent decree, by which the city was invested with title to one-third of the stock in the wharf company. The compromise was approved by an act of the legislature, which declared that the stock should be held by the city as trustee for its present and future inhabitants, and should be exempt from sale for the city's debts. *Held*, that the stock could not be seized and sold for the debts of the city.

The second and third sections of an act of the legislature of Texas, entitled "An act to provide for the sale of the shares in any joint stock or incorporated company on execution," approved March 13, 1875 (session laws of 1875, page 102), provided that:

"In any case where the plaintiff has recovered a final judgment against the defendant and the same is unsatisfied, if the plaintiff, his agent or attorney, should file an affidavit in the court where such judgment was obtained, to the effect that such judgment is unsatisfied either in whole or in part,

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and that the defendant is the owner of shares in the capital stock of any joint stock or incorporated company in this state, and that he knows of no other or a sufficient amount of property belonging to the defendant out of which said judgment can be made, the court in which such judgment is pending should issue a writ of garnishment against such corporation. . . . If, on the coming in of the answer of any such joint stock or incorporated company, it should appear that the defendant is the owner of any shares in such company or corporation, . . . the court should order and decree a sale of a sufficient portion of the shares of such company, describing them, in such judgment, as shall be sufficient to pay the debt of the plaintiff and all costs of suit and garnishment."

On May 9, 1879, the plaintiff recovered in this court a judgment against the city of Galveston for \$117,550. On June 9, 1879, an execution was issued on said judgment, and on the same day returned unsatisfied, and said judgment still remained unsatisfied. On the same day Hitchcock & Co. filed in this court a petition verified by affidavit, in which the foregoing facts were recited, and in which it was alleged that the judgment debtor, the city of Galveston, was the owner of shares in the corporate stock of the Galveston Wharf Company, a company incorporated by the laws of Texas, and residing and doing business in said city of Galveston, and realizing and declaring dividends to its stockholders, including the city of Galveston, and that there was no other sufficient property belonging to the judgment debtor out of which the judgment aforesaid could be made.

Thereupon the plaintiffs prayed for a writ of garnishment against the Galveston Wharf Company, requiring it to answer what number of shares in its capital stock was owned by the city of Galveston, and the par value thereof, and also what were its liabilities to the city of Galveston, and also what effects of said city it had in its possession, and what credits and effects of said city there were in the hands of any other person, to the best of its knowledge and belief,

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and that at its next term this court would order a sale of said shares of stock, that the proceeds thereof might be applied to the payment of said judgment.

On the same day (June 9, 1879) a writ of garnishment was issued, and on the next day served on the Galveston Wharf Company.

The wharf company, on November 6, 1879, filed pleas to the jurisdiction, demurrers, and an answer to the writ of garnishment and the affidavit on which it was based.

The answer set forth that at the date of the service of the writ of garnishment the city of Galveston was the owner of six thousand two hundred and twenty-two shares of the capital stock of the wharf company, for which it held a certificate dated March 1, 1869, each share being for the sum of \$100; that the foundation and nature of the right and title of the city to said stock was as follows: The property of said wharf company consisted of lands upon the Bay of Galveston, constituting the water front of the city, and extending to the channel, and covering the extension of the streets of the city to said channel portion, and extending from east to west in front of the city from Tenth to Forty-first streets inclusive, and of wharves built over said lands and a portion of said streets to the channel of the bay and harbor, and in the franchise of collecting tolls and wharfage; that prior to March 1, 1879, the city owned no right or interest in said wharf company, but claimed right to the said water front by reason of a public dedication thereof, and by virtue of an act of the legislature of Texas of December 8, 1851, which authorized it to open to the harbor or channel of the bay all its streets running north and south, and to erect wharves at the ends of said streets, and charge wharfage, and (section 3) to fill up such portions of the water front lying between ordinary low tide water mark and the channel on the bay side as the city might deem necessary for public purposes; and by said act (section 4) the state relinquished to the city all the rights and privileges above mentioned, provided that nothing in the said third and fourth sections should be construed to

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affect any legal title to wharf privileges held by any persons in said city; that litigation arose between the city and certain claimants of wharf property and privileges, which resulted in a decision, reported in 23 Texas Reports, pp. 349 to 410 inclusive; that said litigation was revived in 1866, by a new suit commenced by the city of Galveston against the Galveston Wharf Company (which had, in the meantime, been organized) and a number of other claimants to wharf property; that said suit was finally, on April 1, 1869, compromised and settled between the city and wharf company, which compromise and settlement was embodied in a consent decree made by the court, as follows: "*The Mayor, Aldermen and Inhabitants of the City of Galveston v. The Galveston Wharf Company*. This day the above cause came on to be heard, and leave is granted to both parties to amend their pleadings, and amendments were filed, and thereupon the parties announced themselves ready for trial, and waived a jury, and submitted this cause to the court, and further announced that the said parties, plaintiff and defendant, had agreed upon the terms of a final settlement and compromise between said parties, and that the same should be entered as the decree and judgment of the court herein, all errors and exceptions thereto being waived; and the terms of said judgment and decree appearing to the court to be reasonable and fair and for the public interests involved, therefore it is considered, ordered, adjudged and decreed by the court, that the present capital stock of the Galveston Wharf Company, consisting of twelve thousand four hundred and forty-four shares of stock, of \$100 per share, amounting in the aggregate to \$1,244,400, shall be increased full one-half thereof, viz.: by six thousand two hundred and twenty-two shares of \$100 each, amounting to the sum of \$622,200, which said stock of said sum of \$622,200 shall be the property of the mayor, aldermen and inhabitants of the city of Galveston, and the same shall stand and remain on the books of said company as the property of said mayor, aldermen and inhabitants of the city of Galveston; and the equal, undivided one-third of

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the property of said company to be consolidated and vested in it by this decree shall be owned by said city and represented by its said stock, and the said stock and the rights and interests therein, and in said property of said mayor, aldermen and citizens of the city of Galveston, shall be in trust for the present and future inhabitants of the city of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage or any liability for debt whatever, in any other manner than by a vote of four-fifths of all the qualified voters of said city in favor of some clear and specific proposition therefor. The dividends and net earnings of said stock shall be regularly paid to said mayor, aldermen and inhabitants of the city of Galveston, to be disbursed and expended for the public good and benefit of said present and future inhabitants of said city; and that the said plaintiffs shall be represented by three directors in the board of directors of said company, one of whom shall be the mayor of said city, who shall be one of the committee on finance, another shall be an alderman of said city, and the third shall either be an alderman or citizen of said city, both to be elected by the common council of said city; the other six directors of said company to be elected by the remaining stockholders of said company, exclusive of the stock of said city. And it is further expressly understood and agreed between the parties, and is so ordered, adjudged and decreed, that in all the stockholders' meetings of said company, no measure shall be adopted, and no vote, act or proceeding shall be valid, unless by a vote of three-fourths of all the stock of said company exclusive of the said stock of the plaintiff. In consideration of all which, it is further agreed between the parties, and is now considered, ordered, adjudged and decreed by the court, that all property, rights and claims of every kind and description (except certain lots and property hereinafter specified) of the said Galveston Wharf Company, and also all the right, title, interest and claim of every kind and description whatsoever, of the said mayor, aldermen and

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inhabitants of the city of Galveston, in and to all the land and ground extending from the shore or ordinary high water mark of the island of Galveston, to the channel of the bay or harbor, from and including the street known on the map or plan of said city of Galveston as Ninth street, on the east, to and including the street known as Thirty-first street, on the west, including all the ground known as the flats within said limits, and also all rights, capacity, powers and claims of said plaintiffs to build and erect wharves, and take and receive wharfage therefor, at the end of streets now or hereafter running or extending to said channel, be and the same are hereby vested in the said Galveston Consolidated Wharf Company, and to be henceforth the corporate property, right and title of the Galveston Wharf Company, and owned, held, possessed, controlled, used and administered by said company — all the united and consolidated property, rights and claims being represented by said aggregate of \$1,866,000 — the original two-thirds thereof held by the present stockholders, and one-third by the said plaintiff in trust as aforesaid.”

The answer further alleged that this decree was afterwards ratified and confirmed by an act of the legislature of Texas, of date June 23, 1880, as follows:

“An act to confirm the compromises and settlements between the corporation of the city of Galveston, the Galveston City Company, the Houston and Galveston Wharf and Press Company, and the Galveston Wharf Company.

“Whereas, on the 8th day of December, 1851, an act was passed by the legislature, entitled an act granting certain powers to the corporation of Galveston city; and on the 16th day of February, 1852, an act was passed, entitled an act supplementary to an act granting certain powers to the corporation of Galveston city, approved December 8, 1851; and whereas litigation in regard to the property known as the flats, within the corporate limits of said city, existed for many years, retarding the improvement and prosperity of said city, which said litigation was compromised and settled

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by a consent decree, rendered in the district court of Brazoria county on the 1st day of April, 1869, in a suit wherein the said corporation of the city of Galveston was plaintiff, and the wharf company was defendant; and by a further consent decree, rendered in said district court on the 2d day of November, 1869, in a suit wherein the Galveston City Company was plaintiff, and the corporation of the city of Galveston was defendant, and by a sale by the Houston and Galveston Wharf and Press Company to the said Galveston Wharf Company, therefore

“Be it enacted by the legislature of the state of Texas: That the said compromises and settlements between said parties, and the said decrees of the district court of Brazoria county, recited in the preamble hereto, are in all respects validated, ratified and confirmed; provided, that this act shall not be construed to effect the right of claim of any person whatever, not a party to said suits, decrees or compromises. Approved June 23, 1870.”

The answer further alleged that the said city had obtained said shares of stock and now held the same by virtue of said compromise decree so confirmed by the act of the legislature; that since the service of the writ of garnishment dividends had been declared by the wharf company on its capital stock, and that the dividends on the stock of the city amounted to the sum of \$4,170.50, which, on account of the service of said writ, it still held and had declined to pay over to the city; that at the date of the service of the writ of garnishment the wharf company was indebted to the city in no other sum or manner, and had in its possession no other property of said city, and had no knowledge or belief as to any credits or effects of the city in the possession of any other person. And the wharf company claimed, being expressly notified and required by the city to do so, that said shares of stock of the city in the Galveston Wharf Company, and the dividends arising therefrom, were not subject to the process of garnishment. And the wharf company, on its own behalf, claimed that to subject said shares to forced sale and transfer to pri-

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vate individuals for the debt of the city, would violate the contract under which alone the wharf company consented to the issue of said stock to the city, and the rights and interests of the wharf company and the public in the premises, and the law and public policy of the state.

The answer further alleged that the judgment of the said Hitchcock & Co. against the city of Galveston was founded on a contract made on February 28, 1874, and not at any anterior date. And thereupon the wharf company prayed to be dismissed with its reasonable costs and attorneys' fees.

To this answer Hitchcock & Co. filed a motion to strike out such parts thereof as set up that the stock, owned by the city in the wharf company, and the dividends arising therefrom, were exempt from liabilities for its debts, and that a sale thereof would be in violation of the compromise contract under which the said shares were issued, on the ground that these were allegations of equitable defenses to the writ of garnishment, of which this, as a court of law, could not take cognizance.

Hitchcock & Co. also filed exceptions to the answer, on the ground that, notwithstanding the averments of the same, the stock of the city in the wharf company, and the dividends accruing therefrom, were subject to the process of garnishment, and should be applied to the payment of their said judgment.

Mr. F. Charles Hume, for Hitchcock & Co.

Mr. W. P. Ballinger, for the city of Galveston.

Woods, Circuit Judge. The contention of the plaintiffs, that this court has no jurisdiction of the matters set out in the answer of the garnishee because they present equitable defenses to the garnishment, and can therefore be considered only by a court of equity, will not hold.

By the act of 1875 (session acts of 1865, page 102), if on the coming in of the answer of an incorporated company served as garnishee, it appears that the judgment debtor is

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the owner of any shares in such company, the court should order and decree a sufficient number of shares in such company, describing them in such judgment, as shall be sufficient to pay the debt of the plaintiff, to be sold. By this enactment it is made the duty of the court to consider whether the answer denies the fact that the judgment debtor is the owner of the stock, and upon the review of that question the court is authorized to make, or refuse to make, a decree or judgment directing the sale. The court is called upon to act upon the averments of this answer of the garnishee. If it appears that the judgment debtor has no stock in the company garnished, no sale will of course be ordered; if it appears that he is merely a nominal, but not real owner of the stock, no sale will be ordered; if he holds as a trustee, the ownership being in another party, no sale will be ordered. To suppose that the court would order a sale of property not subject to execution, or to which a sale could confer no title, would be to attribute to the court the making of a vain and fruitless order.

When a garnishee answers a writ of garnishment, it is his duty to state with accuracy and directness all facts that may be necessary to enable the court to decide intelligently the question of his liability. Drake on Attachment, sec. 629.

To require an answer, and then disregard it because the garnishee showed that while he was apparently he was not equitably indebted, and to render a judgment against him on such apparent liability, and thereby compel him to go into a court of equity for relief, would be to do a vain and absurd thing. No court of law is bound to any such course. They have and habitually exercise control over their process so as to prevent wrong and oppression.

Suppose that the answer of the garnishee declared that the city of Galveston held stock in the wharf company as trustee for an orphan asylum situate within its limits, would the court order a sale of the stock on the ground that the city held the legal title, and compel the trustee to go into equity to restrain the sale? If the contention of the plaintiff

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iffs is right, that is what it would be the duty of the court to do in such case.

The true rule is, that if the answer of the garnishee discloses that the property in his possession is not subject to levy, or if it is held by the judgment debtor as a trustee, to refuse the order of sale; and if the judgment creditor believes that his debtor has an equitable interest in the property, it is his place to file his bill in equity to render it subject to the payment of his debts. No court of law will order a sale of what is not subject to execution. That this stock of the city of Galveston in the wharf company is not subject to execution is in substance what is set up in the answer of the garnishee. We believe that this court, as a court of law, ought to consider this objection to an order of sale, and, if made out by the proof, to refuse the order. The motion to strike out such parts of the answer as set up the facts which, it is claimed, show that the stock of the city in the wharf company is not subject to be sold to pay the debts of the city, because such defense is of an equitable nature, must be overruled.

We are next to consider whether, upon the facts set up in the answer of the garnishee, the court should order a sale of the shares held by the city in the stock of the wharf company. On the one hand, it is claimed that the answer shows that the city holds the stock as a trustee for the benefit of the present and future inhabitants of the city, and that it cannot therefore be seized and sold, and that the very terms by which it holds the stock exempts it from seizure and sale to pay the city's debts. On the other hand, it is claimed that this stock is held by the city just as it holds any other municipal property, and not otherwise; that the trust is not for any specific purpose; that it is held for profit, and that it is not necessary to carry on the city government, and therefore it is liable for the city's debts.

Property held by a trustee is not liable for his debts and cannot be taken in execution upon judgment against him personally. It is not every legal interest that it is made liable

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to a sale on a *fiery facias*. The debtor must have a personal interest in the property. *Lessee of Smith v. McCann*, 24 How., 398.

The question is therefore presented: Does the city of Galveston hold this stock in the wharf company by such a trust that it is exempt from execution and sale for the debts of the city? The source of the city's title to the stock is fully set out in the answer of the garnishee. The city claimed the water front abutting on the harbor. It claimed the right to extend its north and south streets to the channel of the harbor, and to erect wharves at the harbor ends of the streets, and to charge wharfage, by virtue of an act of the legislature of Texas. The title of the city to this part of the water front was sustained by the decree of the supreme court of the state, referred to in the answer. The city also claimed, by the dedication of the original proprietors, those portions of the water front lying between the streets terminating at the harbor.

Now, it is clearly settled that whatever property the city had in the water front it held for the benefit of the public, and that it was not liable for the city's debts. *Klein v. New Orleans*, 99 U. S., 149. And such property could not be alienated by the city, any more than its streets and squares, save by consent of the legislature. *Hart v. Burnett*, 15 Cal., 530.

When the city, therefore, undertook, by the adjustment and compromise between it and other claimants, which was embraced in a consent decree referred to in the answer, to transfer to a private corporation its title to the water front of the city, it undertook to do what required the legislative sanction to give it validity.

In our judgment, the adjustment and compromise derives all its vitality from the ratifying act of the legislature, and the case stands precisely as if, before the making of the adjustment and compromise, the legislature had authorized it to be made upon the terms and conditions embraced therein.

It was competent for the legislature, in authorizing the sale of the title of the city to the water front, to prescribe the

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conditions of the sale, and to direct what disposition should be made by the city of the consideration received for the property sold. This the legislature by the confirmatory act has undertaken to do. It has said that the city shall hold the proceeds of the property "in trust for the present and future inhabitants of the city of Galveston, and all and every part thereof shall be inalienable and not subject to conveyance, assignment, transfer, pledge, mortgage or any liability for debt whatever, in any other manner than by the vote of four-fifths of all the qualified voters in favor of some clear and specific proposition therefor." These very limitations appear written on the face of the stock certificate issued by the wharf company to the city.

The city, by the authority which permitted a sale of the water front, which was itself trust property, inalienable except by legislative consent, and not liable to be taken in execution, is made a trustee of the proceeds of the sale, not for the benefit of the municipal corporation known as the city of Galveston, but of the present and future inhabitants of the city; those proceeds are decreed by the legislature inalienable except upon the vote of four-fifths of the qualified citizens, and not to be at all liable for the debts of the city of Galveston.

The plaintiffs in this cause propose to sell this property for a debt of the city, the trustee, and to convey it to the purchaser at a forced sale without first obtaining the consent of the court thereto. In other words, they propose to disregard the law of the state by virtue of which the city of Galveston holds title to this property.

To us it appears that the city of Galveston holds the stock in the wharf company as a trustee for the present and future inhabitants of Galveston. It cannot, therefore, be sold for the debts of the trustee. The legislature of the state has said that the stock shall not be liable for the debts of the city. By what authority can this or any other court say that it shall?

The seizure and sale of this stock would also be in viola-

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tion of the rights of the wharf company, assured by the compromise and adjustment, and which have been recognized and confirmed by the act of the legislature. This stock was issued to the city by the wharf company with the reservations set out in the compromise. These reservations have been adopted by the legislature. To allow a sale of the stock in defiance of the terms of the compromise would override rights and privileges conferred on the wharf company by the confirmatory act of the legislature.

To sum up my views on the merits of the case: The title of the city of Galveston to the water front was held by the city as a trustee for the public. *Hart v. Bennett*, 15 Cal., 531. That title was inalienable save by consent of the legislature, and the property was not liable to execution and sale for the debts of the city. By the compromise between the city and the wharf company and the confirmatory act of the legislature, a sale of this property so held by the city for public use to a private corporation was authorized and confirmed. The legislature by the same act directed that the proceeds of the sale should be held by the city on the same trust substantially as the property sold, namely, for the use of the present and future inhabitants of the city of Galveston, and should not be liable for its debts.

In my judgment the city holds as a trustee, and for that reason the trust property cannot be sold for its debts. The legislature has in effect said that it should not be sold for the city debts, and this is another reason why it cannot be sold on execution against the city.

The same reasoning applies to the dividends declared upon the stock. They are not the property of the city, nor liable for its debts. The city is a trustee of the dividends, as of the stock itself. It would be a futile thing for the legislature to say that the stock should not be liable for the debts of the city, if all its fruits and profits could be seized as they accrued, and subjected to the payment of the city's debts.

It seems, therefore, to be the duty of the court to refuse any decree or judgment directing the sale of this stock, or a sequestration of its dividends; and it is so ordered.

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D. G. HITCHCOCK & Co. v. THE CITY OF GALVESTON.

1. In Texas it is permissible practice to make an alternative writ of *mandamus* returnable to the same term in which it was issued.
2. Service upon the mayor of an alternative writ of *mandamus*, issued in fact against the city, but directed to the mayor and aldermen, is a good service.
8. Where the judgment creditor of a city, in order to satisfy his judgment, had garnished stocks owned by the city more than sufficient to pay it, and the question whether said stocks could be subjected to the payment of the city's debts was still pending on appeal, *held*, that the creditor was not entitled to the writ of *mandamus* requiring the officers of the city to levy and collect a tax to pay his judgment.

Heard on demurrer to return made by defendants to an alternative writ of *mandamus*.

Mr. F. Charles Hume, for petitioners.

Messrs. W. P. Ballinger and *R. V. Davidson*, for respondent.

BRADLEY, Circuit Justice. On the 7th of May last, the plaintiff, upon a petition filed for that purpose, obtained an order for the issue of an alternative *mandamus* commanding and directing the defendants, the city of Galveston, to pay forthwith the amount of plaintiffs' judgment, with interest and costs (being a judgment for \$117,540.99, rendered May 9, 1879, with interest at eight per cent. per annum), or to appear before the court on Tuesday, June 1, 1880, and show cause, if any there might be, why the peremptory writ of *mandamus* should not issue, requiring a sufficient tax to be levied, assessed and collected on and out of the taxable property within its corporate limits to pay said judgment, interest and costs, and requiring said judgment, interest and costs to be paid out of the proceeds of such levy, assessment and collection within ninety days from the service of said writ.

The alternative writ was directed to the city of Galveston and to the mayor and aldermen by name, but was served only on the mayor, being served on the day it was issued.

The defendants have appeared and filed a return; first,

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interposing some preliminary objections; and secondly, assigning reasons why a peremptory *mandamus* ought not to be granted.

The preliminary objections are two: First, it is objected that the writ ought not to have been made returnable in the same term, this adjourned term of the court being a mere continuation of the term pending when the writ was issued; and for this objection reference is made to article 1215 of the Revised Statutes of Texas, which directs that the citation shall command the sheriff to summon the defendant to appear and answer the plaintiff's petition at the next regular term of the court. This is substantially the old law, first enacted in December, 1836 (see Laws of 1836, p. 201), and afterwards in 1848 (see Hartley's Dig., 269, art. 810; Paschal's Dig., art. 1506). By an early construction given to this law in the case of *Bradley v. McCrabb*, Dallam (Tex.), 504, it was decided that it related only to the ordinary process obtained from the ministerial officer of the court without the intervention of the judicial power; and not to those extraordinary writs, such as *habeas corpus*, *mandamus*, etc., which are issued by the direction of a court or judge, and which would be deprived of much of their efficacy if they could only be made returnable to a future term. This case was cited and approved in *Fitzhugh v. Custer*, 4 Tex., 391. This objection, therefore, is not sustained.

The other preliminary objection, that the writ was only served on the mayor, must also be overruled. The proceeding is against the city, and is against the mayor and aldermen individually only as representative officers. The mayor being the head officer, the writ was properly served on him. Of course, if a peremptory *mandamus* be issued, it ought regularly to be served on all officers individually whom it is desired to bring into contempt for disobedience to the command of the writ. But for the purpose of eliciting an answer from the corporation to show cause why a peremptory *mandamus* should not be issued, service on the mayor is sufficient.

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Two principal grounds are alleged by the defendants in their return against the application for the writ of *mandamus*: First, that the plaintiffs have not exhausted their ordinary remedies for collecting the judgment; and secondly, that the common council of the city of Galveston have no legal power to levy the tax which the plaintiffs seek to compel them to levy.

The first of these grounds is based on the fact alleged in the return, that on the 9th of June, 1879, the plaintiffs, in order to collect the amount due on their said judgment, caused to be issued out of this court two separate writs of garnishment, one against the Galveston Wharf Company, garnisheeing six thousand two hundred and twenty-two shares of the capital stock of said company, belonging to the city of Galveston, and worth \$35 per share, besides \$4,666.50 of dividends then due the city; the other against the Galveston City Railroad Company, garnisheeing six hundred and ninety-three shares of the capital stock of said company, belonging to the said city, and worth \$12 per share; and that dividends in the former company to the amount of \$18,666 have since accrued to the city on its said stock; and that by said proceedings, all of said stock and dividends have been placed beyond the control of said city; that judgment was given against the plaintiffs in said suit of garnishment against the Galveston Wharf Company (the court considering the said stock not liable for the city's debt), which judgment has been removed by writ of error to the supreme court of the United States by the plaintiffs; and that judgment was given in favor of the plaintiffs in the suit against the Galveston Railroad Company, which judgment has been removed by writ of error to the supreme court of the United States by the defendants, the city of Galveston; so that the question of the liability of said several stocks to the satisfaction of said plaintiffs' judgment is still pending and undetermined.

The property belonging to the city thus garnished amounts to over \$250,000, and is abundantly sufficient to satisfy the judgment in question if it should be held to be

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applicable to the payment thereof. The plaintiffs argue that the city is estopped from urging this objection to the *mandamus*, because it contends and insists that the property garnished is not liable to be applied to the payment of the judgment. But this argument cannot avail the plaintiffs, for they are equally estopped by contending and insisting that it is so applicable. One estoppel meets and nullifies the other; and the fact remains, that here is abundant property of the city to pay the whole demand, which the plaintiffs have taken the ordinary means to subject to that purpose. Had the property been visible and tangible instead of being a chose in action, and had it been levied on under an ordinary execution, it is evident that such execution could not have been returned *nulla bona*. And though the defendant, in such case, had contended that the property levied on could not be sold to pay the city indebtedness, yet, if the plaintiffs insisted to the contrary, and prosecuted their claim to hold it, they could not, whilst prosecuting such claim, demand a *mandamus* for raising a tax also. Had the plaintiffs yielded to the judgment of this court in reference to the stock of the wharf company, they might then, perhaps, have been in a position to ask for this kind of relief. But not thus yielding, they take the attitude of still pursuing the stock as a just means of satisfying their judgment.

It is a well settled principle that a writ of *mandamus* will not be granted where the party has another adequate remedy. Hence a *mandamus* will not ordinarily be granted to compel a municipal body to levy a tax to pay a judgment until, by the issue of an execution and a return of *nulla bona*, it be shown to the court that the plaintiff has exhausted all ordinary remedies for the collection of his debt. In the present case, it is true, *nulla bona* has been returned to the common execution issued upon the judgment. But the laws of this state afford remedies for reaching property which cannot be levied on by ordinary execution. The plaintiffs, perhaps, may not have been obliged to resort to these remedies. But it is shown that they have chosen to do so. They have

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seized upon property of the city sufficient, and more than sufficient, to pay their whole debt; and by a process which holds it as firmly as tangible property can be held under an ordinary execution. They are engaged in prosecuting their right to hold this property. Their very course of action shows that the question whether they are not entitled to hold it is at least a doubtful one. Until this question is decided it does not appear that they have any need of the extraordinary remedy of *mandamus*. The plaintiffs cannot with one hand grasp property sufficient to satisfy their judgment, and reach out the other for a *mandamus* to levy taxes. If their right to the property seized is disputed, they are still in no plight to ask for a *mandamus* until that dispute is decided, or is by them abandoned.

Entertaining these views, I think that the demurrer to the return must be overruled and judgment given for the respondents, refusing the issue of a peremptory *mandamus*. This renders it unnecessary to consider the question of the power of the city to levy the tax in question.

Judgment is given for the respondents accordingly.

NOVEMBER TERM, 1880.

THE LILLIE LAURIE.

1. The lien for salvage and for damage to goods is inferior to the lien of seamen for wages earned on a voyage subsequent to that on which the claims for salvage and damage arose.
2. Claims, which are liens by the general maritime law, are entitled to priority of payment over claims of mortgagees, whether their mortgages were registered before or after the origin of the maritime liens.
3. Liens for salvage and for damages, upon a contract of affreightment, are entitled to priority of payment over debts subsequently contracted for supplies furnished in the home port, and which are a lien upon the vessel by virtue of state law only.
4. The district court dismissed the libel of a salvor for salvage, and rendered decrees in favor of the furnishers of supplies in the home

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port, each of the decrees being for a less sum than \$50, and therefore not subject to appeal. The proceeds of the vessel were insufficient to pay the claim for salvage and the decrees for supplies. The salvor appealed to the circuit court, and pending his appeal the decrees rendered by the district court for supplies were paid in full out of the proceeds of the vessel. *Held*, that the decrees were improvidently paid, and that the question, which was entitled to priority of payment, the salvor or the furnishers of supplies, was carried up by the appeal of the former.

ADMIRALTY APPEAL.

The original libel was filed by Dennis Mahoney to recover seaman's wages. Several other seamen intervened and filed similar libels. One E. N. Stevenson also intervened and filed a libel for damages sustained by the non-performance by the Laurie of a contract of affreightment and for salvage.

Upon this latter libel the facts disclosed by the evidence were as follows: The schooner, in December, 1878, was bound on a voyage from Galveston to Moss's Bluff, on the Trinity river. A part of her cargo consisted of merchandise, valued at more than \$1,200, the property of the libelant Stevenson. On December 16th, a short distance below her destination, on the Trinity river, the schooner, from some cause not explained by the evidence, sank in water twenty or thirty feet deep. Her hull was utterly submerged. The schooner was abandoned by her master, who told Stevenson to undertake to save her as best he could. Stevenson employed a large force of men, and by strenuous exertions raised the schooner and landed her cargo, which was in a damaged condition. This libel was filed to recover the damage sustained by his goods, which he claimed to be \$311, and for salvage, for which he claimed \$150. His claims were not immediately put in suit, owing to the negligence of his proctor, in whose charge they had been placed. The schooner resumed her business and afterwards contracted the debts for seamen's wages for which Mahoney and others brought their libels.

On August 15, 1878, a mortgage on the schooner to one J. F. Magale, for \$240, had been duly recorded in the custom house at Galveston, which was her home port, and on

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June 7, 1879, another mortgage to one B. Dugat, for \$227, was duly recorded in the same office. These mortgagees also filed intervening libels. Certain furnishers of supplies in the home port, who by complying with the local law of Texas had acquired liens on the schooner, also filed intervening libels against her. The supplies for which these latter liens were claimed were all furnished after the sinking of the schooner on December 16, 1878.

The schooner was seized upon the libel of Mahoney, and by order of the district court was sold, and her proceeds, amounting to \$528, were paid into the registry of the court.

The district court made a final decree in the case, dismissed the intervening libel of Stevenson for damages and salvage for want of evidence to sustain it, and decreed in favor of the seamen who sued for wages, the mortgagees and the furnishers of supplies in the home port, who had acquired liens by virtue of the state law, and ordered a distribution of the fund in the registry among those who by its decrees were entitled to it. The decrees in favor of the seamen and the furnishers of supplies were respectively for less than \$50 each.

Stevenson appealed to the court from the decree disallowing his claim and from the decrees in favor of the mortgagees, the fund in the registry not being sufficient to pay him and the mortgagees.

Pending the appeal the decrees in favor of the seamen and the furnishers of supplies, amounting in the aggregate to \$195.93, were paid in full out of the registry of the district court, leaving, after the payment of the costs, only a balance of \$100.37, to be applied to the payment of Stevenson's claims should this court decree in his favor.

Mr. Wharton Branch, for Stevenson.

Messrs. A. N. Mills, Geo. W. Davis and Henry Sayles, for the mortgagees.

Woods, Circuit Judge. The testimony upon the hearing in this court establishes conclusively the claim of Stevenson for salvage and for damage to his goods resulting from the

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sinking of the Lillie Laurie. The salvage claimed — \$150 — only covers the actual expenses incurred by Stevenson in raising the schooner, with a very moderate compensation for his own services. The damage to his goods — \$311 — is also clearly established; and there is no evidence to show that the damage fell within any exception made in the bill of lading. There must, therefore, be a decree in favor of Stevenson for both claims, amounting in the aggregate to \$461.

The sum which the schooner brought when sold by order of the district court, to wit, \$528, not being sufficient to pay all the decrees against her, it becomes necessary to settle the order in which the decrees are to be satisfied.

The claims of the seamen were for wages earned upon voyages subsequent to the date of the salvage service rendered by Stevenson and the date of his claim for damage to his goods. They are, therefore, entitled to priority of payment by reason of that fact. *The Paragon*, 1 Ware, 326; *Surplus of the Ship Trimontain*, 5 Ben., 246; *The Hope*, 1 Asp. Mar. Law Cases, 563; *Porter v. The Seawitch*, 3 Woods, 75.

It has even been held that seamen's wages are entitled to priority over all other claims. *The Paragon*, *ubi supra*.

The seamen are therefore entitled to be paid their claims in full before payment to any other lienholder.

The claims of Stevenson, which are strictly maritime liens, by the general maritime laws are entitled to priority of payment over the claims of mortgagees, whether the same were registered before or after the origin of Stevenson's claims. *Baldwin v. The Bradish Johnson*, 3 Woods, 582.

And Stevenson is entitled to priority of payment over debts contracted subsequent to the date of his claim for supplies to the schooner furnished in her home port, and which are a lien upon the vessel by virtue of state law only. *Baldwin v. The Bradish Johnson*, *ubi supra*; *The John T. Moore*, 3 Woods, 61.

The order in which the proceeds of the sale of the schooner should be distributed is therefore as follows: First, the costs of suit; second, the decrees for seamen's wages; and third,

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the decrees in favor of Stevenson for salvage and for damages to his goods. As the fund in the registry of the court will be insufficient to pay these claims, it is unnecessary to go further.

An interesting question of practice is raised by the fact that the decrees rendered by the district court in favor of the furnishers of supplies in the home port, each decree being for a less sum than \$50, and the decrees, therefore, not being subject to appeal, were paid in full out of the registry of the court, pending the appeal of Stevenson. Were these decrees properly paid? It seems to me clear that they were not. The fund in the registry being insufficient to pay the costs, the maritime liens and the claims of these furnishers of supplies, a controversy necessarily arose between Stevenson and the supply men touching their right to priority of payment. The libel of Stevenson having been dismissed by the district court, his right to priority of payment over the supply men could only be settled in the circuit court, and that question was taken up by his appeal. All that the supply men could insist on was that the amount of their claims should not be disturbed by the circuit court, that having been finally settled by the district court. But as long as Stevenson was prosecuting his appeal and claiming priority over them in the circuit court, they could not settle that question in their own favor by getting payment of their claims in full from the registry of the district court. To hold otherwise would be to allow the fund against which an appellant was prosecuting his claim to be entirely withdrawn, and thus deprive him of all the fruits of his appeal and decree should the appellate court decide in his favor.

When there is a fund in the district court against which several libelants are prosecuting claims, and it is insufficient to pay all, and the claim of one libelant is disallowed, and he appeals to the circuit court, no payments should be made from the fund until after the decree of the circuit court upon the appeal.

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By such an appeal the whole decree is brought up. The part not appealed from remains here in full force, to be executed on the final termination of the cause. What is not reversed is still in force and necessary part of the decree of this court, and is to be executed as such. *The Roarer*, 1 Blatch., 1. The result of this view is that the entire fund should have been sent up to this court with the appeal. "The appeal carries up the *res*, or money in the registry of the district court, to the circuit court, and when the rights of the parties are adjudicated there, the court must carry into execution its own decree." *Montgomery v. Anderson*, 21 Howard, 386.

AT CHAMBERS, APRIL, 1882.

THE PULLMAN PALACE CAR CO. v. THE TEXAS & PACIFIC
RAILWAY COMPANY.

On February 28, 1874, the complainant company entered into a contract with defendant company, which was to continue in force for two years, by which it agreed to furnish sleeping cars to be used by the defendant, sufficient to supply the demands of travel on its line of road, for which the defendant agreed to pay a specified rate. The contract further provided as follows: The car company shall have "the option, if exercised within two years from the date" of the contract, "to determine whether it will make with" the railroad company "a contract of the form and kind hereto attached, marked H, and that if" the car company "shall within two years determine to make such contract," the railroad company "shall enter into such contract" with the car company. The form of contract marked H provided, in substantially the same terms as the original contract, for the furnishing of cars by the complainant to the defendant, and also provided as follows: The car company "is to have the exclusive right for fifteen years to furnish such drawing-room, parlor, sleeping and reclining chair cars on all passenger trains of the railway company on its entire lines, present, prospective, now controlled or hereafter to be controlled by ownership, lease or otherwise, and also on all passenger trains on which it may by virtue of

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contracts with other roads have the right to run such cars; and the railway company is to agree that it will not contract with any other parties to run said class of cars over said lines of road for fifteen years." The complainant within the two years gave notice to the defendant that it elected to enter into said contract H, and executed the same on its part, and sent it to defendant to be executed by it. But the defendant company had made a contract with another car company for the use of its cars, and refused to execute said contract H, and gave notice to the complainant that it would not use complainant's cars. Upon bill filed by the car company alleging the above facts, and praying for an injunction to restrain defendant from discontinuing the use of complainant's cars and from refusing to perform the other stipulations of said contract H, and from permitting any other company to furnish cars for the use of its said lines of road: *Held* (1) That the exercise of the option by the complainant, provided for in the first contract, made the second contract (H) of binding obligation, without further execution. (2) Such second contract was not affected by the statute of frauds of Texas, nor was it forbidden by the laws of Texas or the charter of the defendant company. (3) The injunction prayed for should not be granted.

IN EQUITY. Heard upon motion for injunction *pendente lite*.

Mr. O. A. Lochrane, for complainant.

Messrs. J. H. Kennard, W. W. Howe, S. S. Prentiss and John C. Brown, for defendant.

PARDEE, Circuit Judge. The complainant sets forth in its bill an agreement alleged to have been made on the 28th day of February, 1874, with the defendant company, whereby the Pullman Company was to furnish sleeping cars to be used by the railway company, sufficient to meet the demands of travel on its line of road, to provide the necessary attendants therefor, and also keep said cars in good running order and repairs, except repairs and renewals made necessary by accident and casualty; it being understood that the railway company should repair all damages to said cars, of every kind, occasioned by accident and casualty. The railway company was to pay the Pullman Company for the use of said cars four cents per car per mile for each mile run, and the

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railway company was to repair the cars in its own shops at cost price for the Pullman Company. Settlements to be made monthly. The railway company to furnish and apply lubricating materials, and provide fuel and lights for, and wash and cleanse, said cars.

The railway company was to permit the Pullman Company to place its tickets on sale at the ticket offices of the railway company, and to permit the Pullman Company to collect from passengers using said cars "such sums as may be usual on competing lines furnishing equal accommodations." The Pullman Company was to furnish free passes on its cars for the general officers of the railway company, and the railway company to furnish free passes to the general officers, conductors and porters of the Pullman Company when on duty. This agreement was to continue for *two years*, say till February 28, 1876, "unless another agreement shall have been entered into, as provided in the seventh article; but in case either of said companies should at any time fail to observe the covenants so entered into, it might be terminated by notice." By this seventh article it is alleged the Pullman Company was given "the option, if exercised within two years from the date hereof, to determine whether it will make with the Texas & Pacific Railway Company a contract of the form and kind hereunto attached and marked 'H,' and that if the Pullman Company shall within the said two years determine to make such contract, then and in that case the Texas & Pacific Railway Company shall enter into such contract with the Pullman Company."

The "contract H," so annexed, is a blank form of agreement "between ———, hereinafter called the railway company, and Pullman's Palace Car Company," and contains a considerable preamble and fifteen articles, which may be briefly summarized:

(1) The Pullman Company is to furnish its cars sufficient to meet the requirements of travel over the lines of the railway company now controlled or hereafter to be controlled by ownership, lease, or otherwise; said cars to be satisfactory

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to the general manager or superintendent of the railway company.

(2) The Pullman Company agrees to keep carpets, upholstery and bedding in good order, and to make certain repairs.

(3) The Pullman Company agrees to furnish and pay certain employees on said cars.

(4) The railway company is to furnish certain free passes.

(5) The Pullman Company is to furnish certain free passes.

(6) The servants of the Pullman Company are to be governed by the rules of the railway company, and sundry provisions are made for liability in case of their injury, and indemnity by the Pullman Company.

(7) The railway company is to have said cars on the passenger trains of its lines, now or hereafter to be controlled, in such way as will best accommodate passengers desiring to use them, and furnish fuel, lighting material, and make certain repairs and renovations.

(8) The railway company is to furnish without charge, at convenient points, room and conveniences for airing and storing bedding.

(9) The Pullman Company is to collect certain fares.

(10) The railway company is to permit the Pullman Company to place its tickets on sale at the railway ticket offices, and their sale to be made by the railway's agents free of charge.

(11) The Pullman Company is to have the exclusive right for fifteen years to furnish such drawing-room, parlor, sleeping and reclining chair cars on all passenger trains of the railway company, on its entire lines, present, prospective, now controlled or hereafter to be controlled by ownership, lease, or otherwise, and also on all passenger trains on which it may, by virtue of contracts with other roads, have the right to run such cars, and the railroad company is to agree that it will not contract with any other parties to run said class of cars over said lines of road for fifteen years.

(12) The Pullman Company is to guaranty the railway

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company against damages for infringements of patents and expenses of litigation, etc.

(13) Elaborate provisions are made in regard to cleansing and repairing cars in case of default by party charged with this duty.

(14) Provisions are made for each party having the right to terminate the contract in case the other does not comply with its obligations.

(15) Provisions are made whereby the railway company might, on certain terms, acquire a half interest in all the equipment so furnished.

The bill alleges that on or about the 14th of February, 1876, the complainant notified the defendant that it would exercise the option aforesaid, and sent to defendant a letter advising it that "your orator had thus decided, and that on and after the 28th day of February, 1876, it would operate its cars upon the lines of the railway company, under the terms of the said contract marked 'H,' as aforesaid, and your orator causes duplicate copies of said contract to be prepared, which were duly executed on the part of your orator, and sent by your orator to the said Texas & Pacific Railway Company for execution by said company." The bill then alleges that complainant has continued to operate its cars on defendant's roads under the authority and provisions of said contract, and then alleges that the defendant has notified it that its cars will not be handled any longer. It charges "that the officers and agents of the Texas & Pacific Railway Company do publicly declare that the said railway company has, by contract with others than your orator, engaged for use on its said road, on and after the 15th day of December, 1881, other and different drawing-room and sleeping cars than those of your orator, namely, the cars of the company known as the Wagner Sleeping-Car Company, and your orator has reason to believe, and does believe, that on and after the 15th day of December, 1881, the cars of your orator will be put off the line of the said Texas & Pacific Railway Company, and their use discon-

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tinued, and the cars of persons other than your orator substituted therefor in the operation of the business of said road, in violation of the express terms and provisions of the contract," etc.

The Wagner Company is not made party.

After sundry allegations of apprehended injury the complainant proceeds to ask for an injunction, which is the only relief requested.

The injunction is asked for in the following form: That the defendant —

"May be enjoined and restrained from discontinuing the use and employment of the cars of your orator, on and after the 22d of December, 1881, over its line of railroad; and from refusing to handle the cars of your orator upon any of the passenger trains contemplated and referred to in and by said contract; and from refusing to keep for sale and to sell, at their ticket offices, tickets for the accommodations furnished upon your orator's cars, as provided in said contract; and from making or entering into any contract or agreement with any person other than your orator for the supplying of drawing-room and sleeping cars for use upon the line of said Texas & Pacific Railway Company; and from permitting any other person than your orator to engage upon said line of road in the business of furnishing such cars as aforesaid for the use of said road; and from hauling said cars, for any other person than your orator, upon any of the trains of the said Texas & Pacific Railway Company; and from selling, offering for sale, or allowing to be sold, at the ticket offices or other places under the control of said railway company, the tickets of any other person than your orator, for the accommodation of drawing-room and sleeping cars operated on said road; and from transacting and operating upon the said road the business of drawing-room and sleeping cars, *or other cars of the sort*, contemplated by the contract aforesaid with the said Texas & Pacific Railway Company, except in accordance with the provisions of said contract with your orator; and from violating any of the covenants or agree-

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ments in said contract contained; and for such other relief," etc.

On this bill a restraining order has been granted in the terms prayed in the bill for a final injunction, and the question now presented to the court is whether such an injunction shall issue pending the suit.

The parties have had ample notice for preparation, and counsel have presented the case fully on all the merits it has, and a decision on this question should be decisive of the whole case.

It is not necessary, nor have I the time, to argue fully on all the points presented. I shall merely try to present my conclusions so that they may be understood by counsel. It is not necessary that the Wagner Sleeping-Car Company should be a party to this suit. That company was no party to the original contract. The bill does not declare it to have any subsequently-acquired rights, and clearly it can have no rights that would affect this litigation, or control in any manner the remedies sought by the complainant herein, nor will any decree rendered herein injure or affect that company any more than it will any other person who may have acquired rights subordinate to complainant's contract. For the general rule see *Pomeroy*, 544; also, see *Willard v. Tayloe*, 8 Wall., 557.

The contract set out and detailed in complainant's bill is a valid subsisting contract, and as binding on the defendant in a court of equity as though it had been regularly signed, sealed and delivered, according to the terms of the first agreement between the parties. *Willard v. Tayloe*, 8 Wall., 557; *Pearce v. Cheslyn*, 4 Adol. & E., 225 (31 Eng. Ch., 54); *Atwood v. Vincent*, 17 Conn., 581.

After the first contract between the parties was entered into, all that was necessary to complete the obligations of the second contract was the exercise of the option of the complainant, as stipulated, in time and according to the terms of the first agreement. It was a continuous offer from the defendant, forming a complete contract when accepted by the com-

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plainant. *Boston & Maine Railroad v. Bartlett*, 3 Cush., 224; *Wright v. Brigg*, 21 Eng. C. L., 591; 2 Chit. Cont., 1061. Nor do I think that the alleged contract is affected by the statute of frauds of the state of Texas. See same authorities, and *Pearce v. Cheslyn*, 4 Adol. & E., 225. Nor is it in violation of the laws of Texas, referred to in argument, nor of the charter of the defendant company. The defendant has the right to run its own cars over its own road. These cars may be purchased or leased by the defendant from anybody or company able to supply them.

The alleged contract is one for the lease of cars to be run by the defendant on its own trains over its own roads. The defendant is not obliged by its charter or by the laws of Texas to lease cars from every comer. By simply leasing all the cars it may need from one car manufacturing company, the duties and obligations of the defendant as a common carrier would not be affected, nor would the obligations of the defendant arising under the particular laws of Texas to haul and transport the cars and freight of other roads be thereby affected. Now, taking these views to be correct, and considering that, as alleged in the bill, the contract between the parties is valid and subsisting, and cognizable in a court of equity, and probably in a court of law (see *Pearce v. Cheslyn*, *supra*), it is to be seen whether this court should enforce the contract by equitable remedies, or should remit the parties to damages to be recovered at law, for any violation of the contract suffered by either party.

1. Any injunction issued in this case and granting relief to the complainant, whether mandatory to compel the performance, or prohibitory to restrain the violation of the contract on the part of the defendant, substantially amounts to a decree or order for the specific performance of the terms of the contract. No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court. If the position of the parties were reversed, it does not seem that there could be any order for the Pullman Company to comply, because the court

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could not compel that company to build cars, or purchase cars, or furnish cars "sufficient to meet the requirements of travel" over the extensive lines of the railway company. Nor, in such a case, could any order be issued restraining the Pullman Company from furnishing cars to other railway companies until the contract should be complied with, for the contract has no such scope; and, as is shown, the Pullman Company has just as valid contracts to furnish cars to other railway companies as it has with the defendant. As to mutuality in the equitable remedy, see Pomeroy, Spec. Perf., § 162 *et seq.*, and cases cited in note 1, on page 231; *Marble Co. v. Ripley*, 10 Wall., 339.

2. A decree restraining the defendant from violating the contract, amounting, as it would, to a mandate to comply with the contract, compels the court to supervise and control the performance of continuous covenants, with intricate details, running through a period of nine years, over a vast system of railways, involving large discretion, and the employment of an army of expert agents and business men, "unreasonably taxing the time, attention and resources of the court and its officers, and interfering in the general administration of justice." See Pomeroy, Cont. & Spec. Perf., sec. 307 *et seq.*; also *Marble Co. v. Ripley*, 10 Wall., *supra*. There is a wide distinction to be drawn between this case and the *Atlantic & Pacific Tel. Co. v. Union Pacific Railway Co.*, 1 McCrary, 541, and *Singer Company v. Union Company*, 1 Holmes, 253.

3. The contract is silent as to the number of cars to be furnished by the complainant and hauled by the defendant. It is also silent as to what passenger trains the cars furnished shall be hauled on or attached to, on day trains, night trains, or excursion trains. The defendant is to procure all the cars of the class needed from the complainant, and the complainant is to furnish cars "sufficient to meet the requirements of travel."

The right, then, to determine what cars and what trains are "sufficient to meet the requirements of travel," is vested

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by the contract and by the nature of things in the defendant company. An injunction to the defendant restraining the hauling of any other cars than those furnished by the complainant takes away the power of the defendant to determine what cars are "sufficient to meet the requirements of travel," and vests it permanently in the complainant (for the defendant can have no other cars than the complainant sees fit to or can furnish), and, finally, after necessary delay, and possibly after the occasion has passed or the need lapsed, in the court. It is true that the complainant's failure to perform the stipulations imposed upon him by the contract would *at once* cause a dissolution of the injunction; but the dissolution of the injunction can only be ordered by the court; and the court can only dissolve after notice, a hearing, and a finding, and the *at once* becomes an indefinite time, controlled by the mutations and delays of a litigation, and that through more than one court.

4. Sleeping cars and drawing-room cars have become a necessity on long lines of railway, such as the defendant is operating. The contract which is the basis of this suit substantially farms out, for a period yet to run of nine years, to the complainant, the exclusive right to these necessary accommodations over the defendant's "entire line of railway, and on all roads which it controls or may hereafter control, by ownership, lease or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use" such accommodations, to be by the complainant relet and hired at prices and charges wholly within its own discretion, and beyond the control of the defendant or of the public. It is true that the ninth article of the contract provides that the complainant "shall be entitled to collect from each and every person occupying said cars such sums for said occupancy as may be usual on competing lines," etc.; but such provision is vain, and cannot be enforced, unless, indeed, by a master in chancery who should supervise the sale of tickets and seats. And there is no restriction in the contract to prevent

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the complainant's owning and controlling the usual charges on competing lines, and it is fully within the scope of complainant's business, as set forth in this record.

No provision is made for the introduction and use of the improvements we have a right to expect within the next decade, looking to the increased comfort and security of the traveling public. And there is no provision or guaranty preserving the rights and duties devolving on the defendant under its charter, or preserving and guarding the rights of the public.

In short, the contract, in all its essential features, is the granting of a monopoly,—a monopoly in the accommodations which are necessary to the traveling public,—a monopoly which the courts ought not to favor or foster by the invention or application of extraordinary or unusual orders or remedies.

5. The matter of enforcing such contracts by injunction is within the sound discretion of the court. See *Pomeroy*, Spec. Perf., § 35 *et seq.*; *Willard v. Tayloe*, 8 Wall., 566; *Marble Co. v. Ripley*, 10 Wall., 356.

For the reasons given it seems to me that in the exercise of a sound discretion I should refuse the injunction.

It is therefore ordered that the restraining order heretofore issued in this cause be annulled and revoked, and that the injunction *pendente lite*, prayed for, be and the same is refused.

NOVEMBER TERM, 1882.

CARE V. AUSTIN & NORTHWESTERN RAILROAD COMPANY.

1. A charter-party provided as follows: The cargo (iron rails) "is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, and being so loaded, she shall proceed to Galveston Bay, or so near thereto as she may safely

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get." Lighterage was notoriously necessary at the port of Galveston. *Held*, that the ship was not bound to pay lighterage for discharging the cargo.

2. Where a charter-party which constituted the contract between the parties made no provision for the payment of primage, none was allowed, although it was stipulated for in the bill of lading.
3. Where the amount of the decree of the district court was reduced by the circuit court on appeal by claimants, it was ordered that the costs of the district court be paid by appellant, and of the circuit court by appellee.

ADMIRALTY APPEAL.

Mr. M. C. McLemore, for libelant.

Mr. T. N. Waul, for claimant.

PARDEE, Circuit Judge. The facts of the case are substantially as propounded in the libel and amended libel; the amount due for freight being the only material fact overstated,—£956 5s. 4d. being the true amount unpaid, and not £1,080 11s. 11d. as claimed. Besides this fact, the only other fact contested is whether or not Post, Martin & Co. (claimants and assignees of the bill of lading) had notice of the charter-party in pursuance of which the bill of lading was issued. The evidence on this point is sufficient to establish the fact of notice. Leaving out of the question the recitals on the face of the bill of lading, showing the shipment of an entire cargo of railroad iron, such goods as would be likely to suggest lighterage, and demurrage, etc., the two facts undisputed and unexplained — (1) of the prepayment of one-half of the freight, less interest and insurance indorsed on the back of the bill of lading; (2) and of the consignee's instructions to his agent prior to the arrival of the ship to furnish lighterage,—taken with the fact that lighterage was furnished by the claimant without question, are sufficient to satisfy me that the claimant, who thus carried out the specifications of the charter-party in advance, must have had notice of its existence and terms.

On the construction of the charter-party there is only one question raised, and that is whether, under its provisions, the

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consignees were required to furnish lighterage, if necessary, at the port of destination. The clause in the charter-party in relation to lighterage is in these words:

"That the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall, with all possible dispatch, sail and proceed to Middleboro-on-Tees, where ordered by the charterers, but where she can lay always afloat, or so near thereto as she may safely get, and there load from the factors of affreighters a full and complete cargo of rails, say one thousand seven hundred to one thousand eight hundred tons, at owner's option, not exceeding thirty feet in length, which is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, etc., and being so loaded, shall therewith proceed to Galveston Bay, or so near thereto as she may safely get," etc.

A plausible argument is made that the lighterage therein referred to relates only to the lighterage necessary to take the cargo on board, and not to the lighterage that might be necessary in discharging cargo. It would have been strange indeed, if the parties, in making a charter-party with as many details as this one under consideration has, and when contracting specifically in relation to lighterage, had been silent as to that question, leaving it to custom when contracting for a cargo of railroad iron to the port of Galveston, where lighterage is so notoriously necessary. But I cannot take the narrow view of the clause in question claimed for it by the learned proctor. It is stipulated that the cargo "is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship." The construction claimed would leave the words "and taken from along-side" absolute surplusage, or would render it necessary to hold that when the merchant brought the cargo to the ship, it was to be taken aboard and loaded at merchant's risk and expense, which was, obviously, not the intent nor contract of the parties.

On the question of primage, which has been argued and seems to have been allowed in the district court, I find it is

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only claimed in the libel in the guise of freight, although specified in the bill attached to the libel as primage. The charter-party, as has been found, constituted the contract between the parties, and as that makes no mention of primage, none can be allowed, although it was stipulated in the bill of lading.

Primage is no longer a gratuity to the master, unless specially stipulated; but it belongs to the owners or freighters, and is nothing but an increase of the freight rate.

The charter-party fixes the rate for freight, and the bill of lading given thereunder cannot enhance it.

The case, then, as it appears to me, entitles the libelant to a decree in his favor for the following amounts, to wit: For half freight money, unpaid, £956 5s. 4d.; reduced to United States currency, at \$4.80, agreed rate; making \$4,590.08, with interest thereon from January 9, 1882, at six per cent. For five days' demurrage, at £35 per day, or £175; reduced to United States currency, at \$4.80, agreed rate; making \$840, with interest thereon at six per cent. from January 13, 1882. For charges paid on freight, in landing and caring for same, etc., to wit:

Watchmen, \$28.50 and \$27	\$55 50
Wharfage	75 00
Handling and storing	250 00
Lighterage	562 50

Amounting to..... \$943 00

Upon which interest at six per cent. should be allowed from date of payment, say January 26, 1882, when last payment was made, so far as dates are shown. And as the property libeled, and on which libelant had a lien for his demand, has been released and delivered to the claimants, Post, Martin & Co., on bond to stand in place of the property, the decree should be against the claimants and their sureties on the release bond for the amounts as above found due. The costs of the district court should be borne by the claimants; but as the decree of that court has been reduced, the costs on appeal should be borne by the libelant and appellee.

A decree in accordance with these views will be entered.

TYLER, DECEMBER TERM, 1881.

YOUNG AND OTHERS V. DUNN AND OTHERS.

1. In an action of trespass to try title brought in a court of the United States sitting in the state of Texas, the plaintiff cannot recover on an equitable title.
2. Where one of two partners devised certain property to the partnership of which he was a member, and died, *held*, that the surviving partner took only an equitable estate in the property so devised.
3. A defendant in an action of trespass to try title who does not claim title through or under the plaintiff cannot be estopped by the declarations of plaintiff or any person under whom he claims.
4. Where a jury is waived by some of the defendants, and the facts are tried by the court, no judgment can be rendered against another defendant in default for want of an answer, who does not join in the waiver of the jury.

This was an action of trespass to try title brought against Mary H. Dunn and the Houston & Texas Central Railway Company. The defendant Dunn waived a trial by jury, and the issues of fact as well as of law were tried by the court.

Messrs. Lyle & Thomas, for plaintiffs.

Mr. W. M. Walton, for defendant.

PARDEE, Circuit Judge. Plaintiffs, as devisees by last will and testament of S. C. Colville, bring this suit against Mary H. Dunn and the Houston & Texas Central Railway Company to recover the undivided half of certain three hundred and twenty acres near Dennison, in this state. Defendant Mary H. Dunn has pleaded not guilty, but the railroad company does not appear to have pleaded at all, though counsel assents that a general denial has been entered for the company. But of this hereafter. Defendant Dunn has also pleaded adverse possession, and the statute of limitations of three, five and ten years, and has also entered claim for improvements. Plaintiff and defendant Dunn have filed a stipulation waiving a jury, and the case has been tried by the court. Plaintiff proves a patent from the republic of Texas,

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of date December 2, 1841, of the entire tract to James A. Caldwell. He proves next a letter which has been probated as a will of James A. Caldwell, of date March 21, 1842, which is in these words:

"Mr. S. C. COLVILLE: The business that we have been doing never having been committed to writing, knowing, as we do, the uncertainty of life, I give you this statement of our verbal understanding: *First*, all the land that is connected at Shawneetown which may be owned by either, or in the name of any other, is now the property of both as company stock. Also all the claims that is in your hands that is not located is also joint stock. Also all the animal stock is the same that is at Shawneetown. All property that is known to belong to yourself and myself at that place is joint stock (except a negro girl, Louisa, to which I have no claim). Also all the money that we may have there, or any debts that you or I may have in our trading since you went to that place. And further, as I have had trading in Austin, Travis county, it will also be understood that all my trading there was on the same principle; all the lands that I may have, or town lots, or outlots, or houses and lots, or any negroes that may be in my name, or chattels or any interest that I may have in the trading house of Edington, them and each of them is joint stock betwixt yourself and myself. Now, as life is uncertain, I want you, in case of accident, to be my agent in fact and entire; I want you to have the free use of all my share of this property in case of my death, for your natural life-time, and at your death it to go to the offspring of my only blood relation, now in Texas; that is, Jane McFarland, the wife of Jacob McFarland. These, with other requests that you know, I leave with you, hoping that you will not have this melancholy duty to perform, and that again we will meet and exchange the hopes for long life and friendship.

"Yours in friendship,

[Signed]

"J. A. CALDWELL.

"S. C. CALDWELL."

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Plaintiff next offers last will and testament, duly probated, of S. C. Colville to plaintiffs, and then certain depositions showing insanity, infancy and coverture of the various plaintiffs, running back and covering many years. The defendant proves possession for twenty odd years and improvements.

The difficult question for plaintiffs arises under that so-called will of Caldwell, which is a necessary link in the plaintiffs' chain of title. There seems to be no question that in cases like this of ejectment, the plaintiff must recover on the strength of his own title. Nor can there be any doubt that that title must be a legal title.

An equitable title will not suffice to maintain ejectment in this court, though it may in the courts of the state under the proceedings authorized by the state statutes. See *Sheirburn v. De Cordova*, 24 How., 423.

The letter given in full herein has been duly probated as Caldwell's will, and the question is whether that letter, as the will of Caldwell, conveys the legal title of the land in controversy to Colville. Counsel claims that the intention to convey is apparent, and that the rule is that the intention must govern if not contrary to law.

I concede the law, but I do not find in the will any intention expressed by Caldwell, in technical or untechnical language, to convey or bequeath anything but his own share of certain company or partnership property, and that share is bequeathed to Colville for life, remainder to Mrs. McFarland. There is no general bequest or universal legacy in the instrument. The balance of the will is merely the declaration of a trust in the testator and in Colville of company property, and does not imply or express any desire or intention to convey or bequeath such company property to any person whatever. But giving it the effect of a conveyance or bequest, then it is in its broadest sense a conveyance or bequest to the partnership, and Colville, as a partner, took only an equitable title. For a case in direct point see *Clagett v. Kilbourne*, 1 Black, 346. The whole letter was probably only

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designed by the writer to furnish Colville evidence of the partnership and the extent of the partnership property; at least that is the fair inference from the total absence of all words usual, even among the most ignorant, when attempting to make a will, and Caldwell was not an ignorant man.

The case would be stronger if plaintiffs were suing for Caldwell's half of the tract; for the life estate of that is perhaps conveyed by the letter or will to Colville.

Counsel claim that if the will does not make a legal title for plaintiffs, then, as it declares ownership in Colville of the undivided half of the tract in question, it in some way operates so that the plaintiffs can maintain legal title by estoppel.

I cannot see how the defendant is estopped by the declaration of a stranger. The defendant does not claim or prove any title under either Caldwell or Colville, or anybody else. But, if she is estopped, that does not help us out of the difficulty, which is that the plaintiff must recover, if it all, on a legal title sufficiently proved.

As to the railroad company, either an answer has been filed, in which case no judgment by default can be rendered nor any other judgment for plaintiffs, as they have failed to prove title, or no answer has been filed, and the company is in default; in which case I can render no judgment against the company, as there is no waiver of jury on its behalf.

I find no answer in the record for the company, but counsel for Dunn says in his brief submitted, that one was filed at some time by Hancock & West, attorneys for the railroad company; but, as shown above, it is immaterial for this decision. Let a finding of not guilty and a judgment be entered in favor of defendant Dunn, with costs.

Withers v. Burkett.

TYLER, JANUARY TERM, 1883.

WITHERS v. BURKETT.

The right of action to recover damages for trespass to real estate does not, either at common law or by the statutes of Texas, pass to the devisee of the land.

(Before PARDEE and MORRILL, JJ.)

Heard on demurrer to the petition.

Messrs. Geo. W. Chilton and Horace Chilton, for plaintiff.

Messrs. W. H. Herndon and B. B. Cain, for defendant.

PARDEE, Circuit Judge. This case has been heard upon a demurrer to action brought by devisee of land and residuary legatee for damages committed during life of testator. The devisee claims by virtue of assignment from residuary legatee, who joins *pro forma* in the suit for the use of assignee. By the common law such action survives to neither heirs nor executors and administrators. 2 Wat. Tresp., § 980. The common law is the general rule of decision in this state. Texas Code, art. 3128. The law of the state does not authorize the devise of a claim for damages for trespass to real estate. See article 4858, Texas Code. But such action is saved to the executor or administrator. Article 1201, Texas Code.

It follows that neither of the parties now before the court as plaintiffs have authority to bring the action, and the demurrer should be sustained.

MORRILL, District Judge, concurred.

WESTERN DISTRICT OF TEXAS.

SAN ANTONIO, NOVEMBER TERM, 1880.

H. B. ADAMS ET AL. V. CHARLES M. TERRELL.

1. The jurisdiction of any court may be challenged in any other court where its judgments or decrees are relied on.
2. The bankrupt act of 1867 does not authorize the institution of proceedings against the individual estate of a deceased person.
3. The bankruptcy court acquires no jurisdiction over the individual estate of a deceased partner by a proceeding against the late firm of which he was a member.
4. Where the adjudication in bankruptcy is void, parties who bought property at the bankruptcy sale cannot protect their title by the two years' limitation prescribed by the second section of the bankrupt act.

This was an action of trespass to try title, and was submitted to the court upon an agreed statement of facts.

The plaintiffs and the defendant both claimed title to the lands in controversy under one Enoch Jones, deceased; the plaintiffs as his heirs at law, and the defendant as purchaser at a sale made by the order of the district court for the western district of Texas, sitting in bankruptcy.

The following facts appear from the agreed statement:

Enoch Jones, the ancestor of the plaintiffs, who are his only heirs, was in his life-time and at his death seized in fee of the premises in controversy. During his life-time Jones and one Joseph Ulrich had been engaged in commercial business in the city of San Antonio, under the firm name of J. Ulrich & Co. The partnership between them expired by its own limitation in 1861, while Ulrich was in Mexico. In the year 1862 Jones visited Mexico, where he met Ulrich, and agreed with him to pay off the debts of the firm, and, upon his return to San Antonio, published in two newspapers

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a notice of the dissolution of the firm and that he assumed its debts. There was no provision in the articles of partnership that the partnership should be continued, after the death of either of the partners, by the surviving partner and the personal representatives of the deceased partner.

In August, 1863, Jones died, leaving a will in which I. A. Paschal and Samuel G. Newton were appointed his executors. They qualified and took possession of the estate. The will provided that the executors should not give bond or security, but only take the oath prescribed by law, and that no action should be taken upon the estate in the probate court other than to record the will and file an inventory of the estate. The will further provided that the business of J. Ulrich & Co. should be continued or closed up as the executors and Ulrich might decide to be for the best interests of the estate and the firm. Ulrich and the executors never had any understanding or agreement to continue the partnership after the death of Jones, nor did Ulrich give any authority to the executors to continue the business of the firm or consent thereto.

On November 2, 1867, the partnership affairs had not been closed up by the executors. On that day a creditor of the firm of J. Ulrich & Co. filed a petition in involuntary bankruptcy against said firm in the district court for the western district of Texas. The grounds upon which the petition prayed an adjudication of bankruptcy were, that Ulrich, being absent within six calendar months next before the date of the petition, had, with intent to defraud his creditors, remained absent from the state of Texas, and that the executors of the estate of Jones had fraudulently suspended and had not resumed payment of the commercial paper of the said firm of J. Ulrich & Co., nor of their estate, for the period of fourteen days.

The executors of Jones by their attorneys accepted service of the petition. No notice of said petition was given, nor service of process thereon was ever made on Ulrich, the surviving partner of said firm.

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On November 4, 1867, the firm of J. Ulrich & Co. were formally adjudicated bankrupt by the register in bankruptcy, and Frederick Carlton, Esq., was thereupon duly appointed assignee. On the petition of certain creditors of said firm who had obtained judgments in the United States circuit court against the executors of Jones prior to the adjudication, the bankrupt court directed Carlton, the assignee, to sell certain lands in the said petition described, being the individual property of the estate of Jones, among which was the property in controversy in this suit. By virtue of this order the said real estate was sold, and the lands now in controversy were purchased by the defendant, who, having complied with the terms of the sale, received on April 10, 1868, a deed therefor from the assignee. The proceeds of the sale were by order of the bankrupt court paid to the creditors who had obtained judgments and acquired liens upon the property, the judgments having been propounded in the bankrupt court. At the time of the institution of the proceedings in bankruptcy, and for several years previous thereto, and at the time of the adjudication, Ulrich was in Mexico.

After the distribution of the proceeds of the sale aforesaid and of the sale of some of Ulrich's individual property among the creditors of J. Ulrich & Co., Ulrich received his discharge in bankruptcy.

In March, 1867, the executors of Jones were, upon motion of certain of the heirs, required by the probate court of Bexar county to give bond in the sum of \$50,000 or be removed; but no bond was given, and no order of removal nor any other order has been thereafter made.

By article 1371, Paschal's Digest of the Laws of Texas, it is provided that "any person capable of making a will may so provide, by his or her will, that no other action shall be had in the county court, in relation to the settlement of his or her estate, than the probating and sequestration of his or her will and the return of an inventory of the estate; and in all such cases any person having a claim or debt against said

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estate may enforce the payment of the same by suit against the executor of said will, and when judgment is recovered the execution shall run against the estate of such testator in the hand of such executor."

The same article provided that such executors might be required by the probate court to give bond upon the petition of the creditors or other persons interested in the estate, on making it appear that the executor was wasting the estate. It was under these provisions of the law that the judgments above mentioned were recovered against the executors by the creditors of J. Ulrich & Co., and that the executors were required, as above mentioned, to give bond.

Upon this state of facts the plaintiffs, heirs at law of Jones, brought this suit to recover the lands bought by the defendant Terrell, and held by him.

The defendant pleaded the general issue, and the limitation of two years, prescribed by section 2 of the bankrupt act (Rev. Stat., sec. 5057), against suits between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignees.

Messrs. A. H. Willie and C. L. Wurzbach, for plaintiffs.

Messrs. Jacob Waelder and Columbus Upson, for defendant.

Woods, Circuit Judge. Upon the agreed facts the plaintiffs are entitled to a finding and judgment in their favor unless their title has been divested by the proceedings in the bankruptcy and the sale and deed made by the assignee in bankruptcy to the defendant.

It is insisted by the plaintiffs that the bankrupt court had jurisdiction neither of the persons of the bankrupts nor of the subject matter of the bankruptcy. The defendant claims that the bankrupt court having exclusive jurisdiction of the subject of bankruptcies, and having necessarily decided that it had jurisdiction in this case, and having exercised its jurisdiction, its proceedings cannot be collaterally attacked, and must remain binding until reversed in a direct proceed-

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ing. He claims further that as long as debts of the firm of J. Ulrich & Co. remained unpaid, the partnership existed, at least for the purpose of the collection of its assets and the payment of its debts; that under the terms of the will of Jones, and the peculiar law of Texas cited in the statement of facts, the executors were, in fact, trustees, and that judgments could be recovered against them, and the property of the estate taken in execution; and that a partnership so situated might be put in bankruptcy, notwithstanding the death of one of the partners. He claims further that the acceptance by Ulrich of his discharge was an acceptance of service, or at least waiver of service, the executors of Jones having accepted service, and the jurisdiction of the court over the persons of the firm was complete.

The first question to be answered is, can the proceedings of the bankrupt court be attacked in this collateral way.

The rule has long been settled that the jurisdiction of any court may be challenged in any other court where its judgments or decrees are relied on. *Elliott v. Pursol*, 1 Pet., 328; *United States v. Arredondo*, 6 Pet., 691; *Voorhees v. The Bank of The United States*, 10 Pet., 475; *Wilcox v. Jackson*, 13 Pet., 498. In the case last cited the court says: "The jurisdiction of any court exercising authority over a subject may be inquired into in any other court, where the proceedings in the former are relied on and brought before the latter by a party claiming the benefit of such proceedings."

It has in later cases even been held that the record of a judgment may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that the facts did exist. *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. Gas Light & Coke Co.*, 19 Wall., 58.

These authorities, if authorities were needed, fully dispose of the question under consideration. And it is a most reasonable conclusion. No court can acquire jurisdiction

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and shut out inquiry by asserting or assuming that it possesses it.

The validity of the proceedings of the bankrupt court under which defendant claims are therefore open to attack in this case.

We are next to inquire whether the individual property of the estate of Jones could be drawn into and administered in the bankrupt court by a proceeding against the firm of which, when alive, he had been a member.

Whatever power the bankrupt court possesses over the subject of bankruptcies, it derives exclusively from the bankrupt act. Power not conferred by that act it does not possess. We look in vain through its sections to find any authority conferred to put the estate of a deceased person into bankruptcy. The twofold purpose which the bankrupt act has in view, viz., the equal and just distribution of the bankrupt's estate among his creditors, and the discharge of the bankrupt from his debts, does not require the application of the law to the estate of a deceased person. The laws of the state provide for an equitable and just distribution of the decedent's estate, and death has already discharged him of all personal liability. The bankrupt law could in the case of a deceased person accomplish nothing not already accomplished without it.

While there is no direct authority given by the bankrupt act over the estates of deceased persons, the implication from what is expressed is strongly against such a jurisdiction. Section 12 of the act (Rev. Stat., 5090) declares that if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived. That is, the estate of a deceased person may be administered after his death if the court has acquired jurisdiction over it in his life-time.

This excludes the idea that such jurisdiction is conferred unless it is acquired during the life-time of the bankrupt. It has therefore been held that if the debtor, in a case of involuntary bankruptcy, dies after the issuing of the order to

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show cause and before the trial, the proceedings abate, they being analogous to actions at law for torts which abate on the death of the party. *Frazier & Fry v. McDonald*, 8 B. R., 237.

There being, then, no warrant in the bankrupt act to justify an adjudication in bankruptcy against the individual estate of a deceased person, can such proceedings be sustained against his estate by means of a proceeding against the late firm of which the deceased was a member?

The same lack of authority meets us here. There is absolutely no expression in the bankrupt act which warrants the assumption that the bankrupt court can take jurisdiction over the individual estate of a deceased partner. The law does not in terms confer jurisdiction over the assets of a partnership, one of whose members is dead. Hence it has been held that, if a firm is dissolved by the death of one of the partners, the executors of the deceased partner cannot be brought into bankruptcy. *In re Stevens*, 1 Saw., 397; *S. C.*, 5 B. R., 112.

And if the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property, the district court may, in its discretion, even refuse to adjudge the partnership bankrupt. *In re Dugget*, 8 B. R., 433.

I conclude, therefore, that over the individual estate of Jones the bankrupt court acquired no jurisdiction by this proceeding in bankruptcy.

Nor is this conclusion to be overturned by the fact that the executors of Jones were not required, under the terms of the will and by the laws of Texas, to account to the probate court. If they had been purely trustees, deriving no authority whatever from the probate court, the estate committed to them could not be drawn into bankruptcy. The bankrupt law makes no provision for the bankruptcy of trust estates, except by proceedings against the *cestui que trust*. The only reference to trust property is the provision that "no property held by the bankrupt in trust shall pass by the assignment."

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An indispensable requisite to an adjudication in bankruptcy is the existence of a person who owns in his own right, either severally or jointly with another, property which it is the purpose of the adjudication to bring into the bankrupt court. In the case of the private property of a deceased partner, there is no person *in esse* against whom the proceedings will lie.

But the plaintiffs insist not only on the want of jurisdiction of the bankrupt court over the subject matter, but also on its want of jurisdiction over the person.

It is clear, if what has already been said is true, that the bankrupt court acquired no jurisdiction by a service of its process upon the executor.

The only method by which the property of a partnership dissolved by death can be drawn into the bankrupt court is by service on the surviving partner, in whom is the title to all the partnership property. Ulrich was the surviving partner of the firm of J. Ulrich & Co. No service of any kind was ever attempted to be made on him.

But it is said he accepted a discharge from the bankrupt court. This, however, does not cure the want of service, at least so far as it concerns the individual property of Jones, even if it is effectual as to the partnership property. It is, to put it in the best light for the jurisdiction, the entry of an appearance after judgment without process and without service of any kind. The acceptance of the discharge may estop Ulrich; it can have no other effect.

My view is, therefore, that the bankrupt court, by the proceedings in bankruptcy against J. Ulrich & Co., acquired no jurisdiction over the individual property of Jones, a deceased member of the firm, and that the title of defendant in this action derived through said proceedings is null and void.

With the bankrupt proceedings must fall the plea of the two years' limitation prescribed by the second section of the bankrupt act against suits between an assignee in bankruptcy and any person claiming an adverse interest touching any property or rights of property transferable to or vested in

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the assignee. If the bankrupt proceedings are void for want of jurisdiction, there was no adjudication of bankruptcy, no bankrupt, no assignee, and no property transferable to or vested in him. In short, all the attempted proceedings in bankruptcy are as if they had never existed. There is, therefore, no basis for the limitation to rest on.

There must be a finding and judgment for the plaintiffs.

AUSTIN, AUGUST TERM, 1881.

STILL & BROTHER V. READING AND OTHERS.

1. A patentee whose letters patent had more than sixteen years to run, sold the exclusive right to J. S. to use, and license others to use, for the period of five years, the invention described in the patent. *Held*, that the patentee could, during said period of five years, maintain an action against an infringer.
2. In such an action the petition should allege that the defendant had no authority from J. S. to use the invention.

Heard on demurrer to the petition.

Messrs. John Hancock, C. S. West, J. W. Robinson and Walton, Green & Hill, for plaintiffs.

Mr. S. S. Boyd, for defendants.

TURNER, District Judge. The plaintiffs in their petition allege that on the 18th day of September, 1877, they obtained letters patent from the United States government for the exclusive right to use, make and vend their new invention, and known as the "Still saddle-trees;" that on the 15th day of January, 1878, petitioners contracted with one J. S. Sullivan & Co., of Jefferson City, in the state of Missouri, and sold to the said J. S. Sullivan & Co., the exclusive right to use their said invention, except that the plaintiffs reserved the right to use their own invention in their two

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shops in Texas; that said contract with J. S. Sullivan & Co. was to continue in force for the term of five years; that the letters patent granted to them (the petitioners) was to secure, and did secure, to them the exclusive right to use and control their said invention for the term of seventeen years.

The petition alleges that these defendants have infringed the right secured to plaintiffs by said letters patent by the use of their invention in the construction of saddle-trees, etc., since the 1st day of January, 1880, up to the time of filing their suit. The petition alleges that in the sale of the use of their invention to J. S. Sullivan & Co., it was agreed that said J. S. Sullivan & Co. should pay to the plaintiffs a certain sum of money for each saddle-tree made, used, etc.; that the defendants, by using plaintiffs' saddle-trees, and by sales of saddles, etc., have deprived them of their just rights as patentees, and have, in fact, infringed upon their patent, and thus deprived them of the royalty that they would be entitled to if they had secured their right to make said saddle-trees under a contract with J. S. Sullivan & Co. The petition alleges that defendants are not using their invention by their authority, and not under authority or by virtue of said contract between petitioners and said J. S. Sullivan & Co. Plaintiffs claim to have been damaged by defendants in consequence.

This is a brief statement of the allegations in the petition down to the thirteenth paragraph.

In this paragraph it is alleged that defendants agreed to make a partial compensation to plaintiffs and to cease the use of said trees; but at the very time such settlement was about to be made, other persons hereinafter named, of large fortune, etc., acting together with a view of ignoring, obstructing, defeating and intimidating plaintiffs from asserting their right, issued a circular, which circular is copied into the petition, which circular being received by the defendants, they declined to pay petitioners, and continued the use of plaintiffs' invention, etc.

To this petition a demurrer is interposed. The first point

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raised is that these plaintiffs cannot, under the facts of the case, maintain a suit in their own name in any event, because of the sale to J. S. Sullivan & Co. of the right to use for the period of five years, a little less than one-third of the time the benefits of the invention were secured to plaintiffs. I hold that plaintiffs have a beneficial interest in the right secured to them by their letters patent, which in a proper case they may protect in a court of justice. They certainly own the remaining interest after the lapse of five years, and if that interest is of value they have a right to see that it is not destroyed.

To illustrate, let us suppose that these defendants are in fact using plaintiffs' invention to their damage, and Sullivan & Co. refuse to take notice of the infringement; or suppose that Sullivan & Co. with a view of avoiding the payment of the royalty due to plaintiffs by them, have an understanding with defendants that they will not interfere with them, and they divide profits, and thus attempt to deprive the plaintiffs of the royalty justly due them,—I certainly think plaintiffs have such rights in their inventions as that they could protect it. Plaintiffs have not sold their right to their patent as patentees; they have sold merely the exclusive right to use it for the space of five years, according to the petition of plaintiffs, and nothing more.

This point of the demurrer is, in that view of the case, not well taken. The argument of the case having taken this view of the question, I have thought it proper to notice it, and the same is overruled.

The material point, however, in the case is that taken and raised by the demurrer, which goes to the sufficiency of the petition to enable plaintiffs to recover under it, all its allegations for the purpose of this demurrer being admitted. The petition shows the sale to J. S. Sullivan & Co. to have been made January 15, 1878. The injuries complained of began January 1, 1880. After this sale to J. S. Sullivan & Co. any person to whom they should grant the right to use the Still tree would be protected thereby, and plaintiffs' remedy

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would be by suit against Sullivan & Co. for the royalty. It follows, therefore, as the plaintiffs show, that J. S. Sullivan & Co. have the right to use their invention and authorize other persons in the United States to use the same; that in order to make a *prima facie* case of liability against a person for using the Still patent, it must affirmatively appear that such person is not using it under the authority or license of J. S. Sullivan & Co. Does the petition show this? The rule to be applied is that the pleadings will be construed most strongly against the pleader.

It is insisted by defendants that this is a necessary allegation, and I am of the same opinion; because, if these defendants are working under Sullivan & Co., and using Still's patent, then, of course, the only remedy plaintiffs can have is by suit against Sullivan & Co. for their royalty. If defendants are not working under Sullivan & Co., and are infringing plaintiffs' patent, then plaintiffs would be entitled to their remedy against them; hence the necessity of the allegation that they are not authorized to use plaintiffs' invention by J. S. Sullivan & Co. It is alleged that they are not using it under authority or by virtue of the contract between plaintiffs and J. S. Sullivan & Co., but that is not alleging that they are not using it under or by virtue of a contract made by defendants with J. S. Sullivan & Co. The demurrer, therefore, upon this point is sustained.

The thirteenth paragraph cannot be relied upon as connecting the J. S. Sullivan Saddle-tree Company with the J. S. Sullivan & Co. to whom plaintiffs sold, because it states that certain persons hereinafter mentioned. This is inferentially saying that they have not been mentioned before. But suppose it did, and the circular should be regarded as part of the petition, and that Sullivan & Co. were, in fact, the Sullivan Saddle-tree Company. What then follows?

The most that could be said would be that the Saddle-tree Company were authorizing these defendants to use the Moody tree, and in that event, if the Moody tree is the one invented by plaintiffs, then J. S. Sullivan & Co. are respon-

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sible to plaintiffs for the royalty, and their remedy is against them and not against the defendants in this suit. If the Moody tree is not the Still tree, then there is no infringement of plaintiffs' invention, and they cannot complain.

The demurrer to their petition on this point is sustained, as also to the prayer. The demurrer to the prayer is also well taken.

FEBRUARY TERM, 1883.

THE UNITED STATES V. JOHN H. WASHINGTON AND OTHERS.

Congress had no constitutional power to pass the act of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights" (Sup. to Rev. Stat., vol. 1, p. 148). Said act is therefore null and void.

Heard upon motion to quash information.

Messrs. George Goldthwaite and Pendexter & Wooten, for the motion.

Mr. A. J. Evans, United States Attorney, *contra*.

TURNER, District Judge. On the 13th day of June, 1883, the district attorney of Texas filed in this court an information against one John H. Washington and others. The information was based upon an affidavit made by one White, stating the facts embraced in the information. The information charges, in substance, that on the 5th day of August, 1882, one Laura Evans, a resident citizen of the state of Texas, desired to go from Austin, Texas, to the city of Houston, Texas, and that, in pursuance of such desire, purchased a first-class ticket of the Houston & Texas Central R. R. Company from Austin to Houston. That said railroad company is a corporation which owned and operated their railroad from Austin, Texas, to points south and south-east of said city of Austin, to Houston and other points in

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Texas, etc. That the defendants, acting as agents of the said railroad company, refused the said Laura Evans admittance to the coach or car of said company used for the conveyance of persons of her sex, and required her to enter the car known as the smoking car, where she would be subjected to indignities and inconveniences not met with in the car usually occupied by females, and that she was thus discriminated against solely on account of her race and color, she being of African descent, etc., etc.

The information is filed upon the idea that the acts complained of render the defendants liable to a prosecution under the act of congress of March 1, 1875, and to recover the penalty therein announced against persons violating the provisions of that act.

Whilst the information does not state in terms that the Texas Central Railroad Company was chartered by the state of Texas, such is the import of the words, and such is the fact. Therefore the railroad company is, for all legal purposes, a person and resident and citizen of Texas, as well as their agents, the defendants. A motion is made to dismiss the case for want of jurisdiction of this court, the point being that the act of congress, so far as it undertakes to regulate and control the conduct of the private citizens of the same state, is without constitutional authority, and therefore of no effect. The authority for the act of congress referred to must be found, if found at all, in the fourteenth amendment of the constitution of the United States. It is universally conceded that the United States government is one of limited powers; that congress can only legislate upon such matters as it is authorized by the constitution of the United States, or such as arise by necessary implication from those actually and specifically conferred. The fourteenth amendment is as follows:

“ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No *state* shall make or enforce any law which shall abridge the

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privileges or immunities of citizens of the United States, nor shall any *state* deprive any person of life, liberty or property without due process of law, nor deny to any person without its jurisdiction the equal protection of the laws."

Then follows the provision which gives congress the power to enforce by appropriate legislation this provision. The act of congress invoked reads: "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theaters and other places of public amusement, subject to the condition and limitations established by law, and applicable alike to citizens of every race and color, regardless of any conditions of servitude."

There is no allegation in the information that there is any law of the state which makes or undertakes to make any discriminations against persons of African descent, nor is it believed that any such law exists in this state.

The defendants are all citizens of this state, and the ticket purchased was from one point in the state to another point in the state.

The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress. If the state has not by its laws or officers over-stepped these limitations, no case arises for the exercise of the power conferred on the federal congress. The first clause of the amendment simply declares who are citizens of the United States and of the state where they reside, and it does nothing more. The balance of the article is directed against state action. If it had been intended to confer upon congress the power to legislate with reference to the infraction of the rights of one citizen of the state against another citizen of the same state, it would have said so. I do not think the power was conferred by this section to declare that the federal court should have exclusive and concurrent jurisdiction with the state courts to protect the rights of national and state citizenship; if so, then the inhibition against the

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state action is superfluent. I am of opinion, therefore, that the act of congress under which this action is prosecuted is without the sanction of the constitution. The party injured has her redress in the state court. How long our railroad companies will continue in their employ men possessed of the spirit which actuated the defendants in this case I do not know. That the party complaining was entitled to accommodations equal in all things to other passengers who rode upon the train there can be no doubt. It is no credit to the railroad companies that they retain in their employ agents such as these defendants, from the allegations in the information, seem to be. The question before me, however, is one of jurisdiction. It is not pretended that there is any unfriendly legislation against the colored man in this state, and it cannot be said that the act complained of is in any way connected with the instrumentalities used by the state in the administration of its government, either legislative, executive or judicial. In short, the state is in no manner connected with or implicated in the acts complained of, and it does not come within the inhibitions mentioned in the fourteenth amendment to the constitution, and consequently the authority for the act in question is wanting, and this court has no jurisdiction of this cause. I am not without authority in this view of the case. See the following cases: *In re Tiburcio Parrott*, 1 Fed. Rep., 481; *The Slaughter House Cases*, 16 Wall., 36; *United States v. Cruikshank*, 92 U. S., 542; *United States v. Harris*, 106 U. S., 629.

These cases must be held to be conclusive upon the point, and the motion to quash must prevail.

NORTHERN DISTRICT OF TEXAS.

APRIL TERM, 1880.

PARBOTT V. ALABAMA GOLD LIFE INSURANCE COMPANY.

1. A defendant to a suit in a state court who moves to quash the service of process upon him, and petitions for the removal of the cause to a court of the United States, and upon such removal renews his motion to quash, does not thereby enter an appearance by which the service of process is made unnecessary.
2. A state law which authorizes a personal judgment against a non-resident defendant upon the service of process on him outside the limits of the state, is beyond the legislative power, and is null and void.

Heard upon motion to quash service of process.

Messrs. T. N. Waul and W. L. Prather, for the motion.

Messrs. M. D. Herring, J. M. Anderson, D. H. Kelly and Charles A. Jennings, *contra*.

McCORMICK, District Judge. Two questions occur on the consideration of this motion: (1) Has the defendant been served with process such as can compel an answer to plaintiff's suit, or permit the court to proceed with the case were no answer or appearance made by the defendant? (2) Has the defendant, by obtaining a removal of this cause from the state court and having the transcript entered here, made such an appearance, either in that court or in this, in said cause, as dispenses with the requirements for bringing in parties by service of process?

The last question will be considered first, as, if it is determined in the affirmative, the other question becomes immaterial. The statute in reference to removal of causes under which this case is brought here explicitly declares that after

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reaching this court the case shall proceed as if originally brought in this court. The proceedings for removal appear to be no part of the case for any other purpose than to effect the removal of the case from the state court to this court in the precise condition said case presented in the state court at the time the application for removal was presented to that court. That application cannot certainly be taken as a consent to submit to the jurisdiction of the state court; and, as I understand the doctrine of appearance taking the place of or dispensing with the use of process to bring parties under the jurisdiction of the court, there must be some action of the party which reasonably evidences a voluntary submission to the jurisdiction of the court over the person of the party. In this case the defendant's first action in the state court is to except to the process by which it was attempted to give that court jurisdiction of the person of the defendant. And the first action of the defendant after the case reached this court was to interpose that exception here. I am, therefore, constrained to hold that the defendant has not waived the use and service of proper process of summons or citation in this case.

It becomes necessary, then, to consider the other question: Has the defendant been properly served with due process of summons or citation in this case? Service was attempted to be made under the act of the legislature of this state of 1875, "prescribing the mode of service in certain cases" (Session Acts 1875, p. 170), by having a certified copy of the petition and a writ called a "citation," directed "to any person residing in Mobile county, Alabama, competent to make oath of the fact of service hereof," served on the defendant by delivering to the president of the defendant company, in said Mobile county, Alabama, said certified copy of petition, and a true copy of said writ, by a person who makes oath that he made said delivery. No affidavit that the defendant was a non-resident was made by anyone, and no publication of any writ of citation was made, or any method of service attempted other than that above indicated. But, in the view I feel con-

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strained to take of the question under the authorities, it is wholly immaterial whether the method pursued in this case meets the requirements of the act of 1875, above referred to, or not. It is clear to my mind that any service, however made, by the authority and power of a court of this state, under the laws of this state, executed in another state, cannot have any greater effect than that pertaining to what is generally styled service by publication. As to the effect within the state where the suit is pending of service by publication of notice or citation to a non-resident party, there appears to be a marked difference of opinion and judgment between the state courts of this state and the courts of the United States. I am not sure that an authoritative decision has been made on this question by the supreme court of this state, but the language of the justices delivering the opinion of that court in *Campbell v. Wilson*, 6 Tex., 379, and in numerous subsequent decisions, down to and including *Wilson v. Zeigler*, 44 Tex., 657, clearly indicates that the judges of the supreme court of this state have been of opinion that service by publication of citation, under the statutes of this state, to a non-resident defendant, would authorize such a personal judgment against the defendant as could be enforced by execution against any property of the defendant found in this state. And it is believed that this opinion has been very generally held and acted upon by the legal profession and by the courts of original jurisdiction in this state. This question came directly before the supreme court of the United States in the case of *Pennoy v. Neff*, 95 U. S., 714, and the judgment of that court in that case, to use the language of Mr. Justice Hunt, as found in his dissenting opinion, "is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. It (the judgment) therefore affects all like cases, past and future, and in every state." I will not repeat, or attempt to add to, the reasoning of the opinion of the court as announced by Mr. Justice Field. That decision is conclusive of the question in

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this court, and on the authority of that case the proceedings by which service was attempted to be had on the defendant in this case are held to be void, and on the grounds above indicated. The motion to quash is sustained.

APRIL TERM, 1881.

UNITED STATES v. SLATER.

Under the present constitution of Texas, an elector otherwise qualified who has resided in the state one year, and in the district in which he offers to vote six months next preceding the election, is entitled to vote for all state and district officers.

Heard upon motion to quash information.

Mr. F. W. Miner, United States Attorney, for the United States.

Mr. J. A. Martin, for defendant.

McCORMICK, District Judge. The information in this case charges in substance "that the defendant, on the 2d of November, 1880, at Marlin, Falls county, Texas, as an officer of a general election, including among other officers to be voted for a representative in congress, did unlawfully and knowingly receive the vote of one J. P. Kramer, a person who was not entitled to vote then and there at said election, because he, the said J. P. Kramer, had not been a citizen of and had not resided in Falls county for and during six months next preceding said election, but the said J. P. Kramer had been a resident and citizen of Robertson county, Texas, down to a period within less than six months prior to said election."

The defendant moves to quash the information on the ground—" *First*, that the bill charges no offense against the laws of the United States; *second*, because it does not appear from said bill of information that the said J. P. Kramer did

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not reside for the last six months in the district in which he offered to vote and did vote."

The question raised by this motion is, does this bill of information show that said J. P. Kramer was not entitled to vote at all, at the time and place when and where said election was held? Our present constitution, then in force, declares "every male person (not subject to certain disqualifications), who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; . . . and all electors shall vote in the election precinct of their residence; *provided*, that all electors living in any unorganized county may vote at any election precinct in the county to which such unorganized county is attached for judicial purposes."

Of our previous constitutions, that of 1845 and that of 1866, the provisions of which were in force from the original formation of the state to the 30th of March, 1870 (besides other qualifications not necessary to mention), provide that a person who "shall have resided in this state one year next preceding an election, and the last six months within the district, county, city or town in which he offers to vote, shall be deemed a qualified elector; and should such qualified elector happen to be in any other county situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer; *provided*, that the qualified electors shall be permitted to vote anywhere in the state for state officers."

Here the qualification to vote, so far as residence is an element of it, is manifestly that he shall have resided one year in the state and the last six months within some legally defined district of the state; but such a residence only qualifies him to vote for state officers and for district officers when voting in some county embraced in the district, as defined by law, in which he resides. It is true that he cannot

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reside in any district without at the same time residing in some county (or territory), organized or unorganized; but it will not be claimed that he cannot reside six months in a district composed of several counties, without residing six months in any one county. And there is no more reason in requiring that the six months' residence should be in one county in the district to entitle him to vote for state and district officers, than there would be in going further and requiring that the six months' residence should be in the same city or town in the county to entitle him to vote for county officers; to do either would be to disregard the plain import of the language of the constitution. To my mind it is perfectly clear that from 1845 to 1870 J. P. Kramer would not have lost his right to vote for state and district officers by moving from Robertson county to Falls county within six months next before a general election.

The constitution of 1870 has two distinct and not entirely harmonious provisions on the subject of suffrage — art. 3, § 1, and art. 6, § 1. That constitution, however, had the same provision, in reference to voting for state officers anywhere in the state and district officers anywhere in the district of the voter's residence, as is contained in the preceding constitution, as above shown. The constitution of 1870 also provided that only such as were "duly registered" could vote. Our present constitution provides that "no law shall ever be enacted requiring a registration of the voters of this state," and this provision occurs in a section which says: "In all elections by the people the vote shall be by ballot, and the legislature shall provide for the numbering of tickets, and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; but no law shall ever be enacted requiring a registration of the voters of this state." This section, to my mind, fully explains (if it needed other explanation than is furnished by common observation and experience) the provision heretofore noticed that "all electors shall vote in the election precinct of their residence."

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But if, being a citizen of the United States, a residence of one year in the state, and the last six months next before the election within the district, will give him a right to vote in the election precinct in which he resides, for what officers can he vote? Our present constitution provides (article 6, § 3): "All qualified electors of the state, . . . who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers." It is clear that a residence in the district for six months does not give the right to vote for city or town officers, unless the residence has been in said city or town; and, by parity of reasoning, such residence would not give the right to vote for county officers unless said six months' residence had been within the county; and, by a like parity of reasoning, such residence would give the privilege of voting for district officers and for state officers, he having the other qualifications, and having resided the required six months in the district, and the required one year in the state, next before the election, and duly presenting himself in the election precinct in which he resides. And this rational conclusion is made irresistibly strong by the previous uniform practice of permitting qualified electors of the state to vote for state and district officers, where their residence was not such as to authorize them to vote for county officers at the time and place of their offering to vote.

Our government is founded on the elective franchise. The right to exercise this franchise is declared, defined and guaranteed by organic provisions superior to any of the departments of the government. The legislature cannot enlarge it or restrict it, and can only regulate it so far as their authority to do so is expressly, or by necessary implication, given in the constitution. Much less may the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions, on the subject of the enjoyment of the right of suffrage, such a construction as will permit the most

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liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions. From a very careful consideration of the subject, I am of the opinion that, for all that is shown in this bill of information, said J. P. Kramer was entitled to vote at the time and place mentioned, and that the motion should be sustained; and it is so ordered.

OCTOBER TERM, 1881.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY v. TEXAS
& ST. LOUIS RAILWAY COMPANY.

1. An act of the legislature of Texas which recognizes the existence of a corporation organized under the laws of Kansas, and confers upon it within the state of Texas the same rights and powers as were granted it by the state of Kansas, within its territory, but does not purport to create a new corporate body, is merely an enabling act, and does not make such corporation a corporate body or citizen of the state of Texas.
2. That part of section 1, article X, of the constitution of Texas which declares: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-executing, but requires appropriate legislation to regulate the exercise of the right thereby conferred; and the exercise of such right may be restrained until, by negotiation or legal proceedings, it is established with proper limitations and conditions.
3. Where a railroad company was threatening to construct its road upon such a route as would cross on the same plane the line of another railroad company at two points within a distance of two hundred and ninety feet, and less than a mile from another crossing of the same roads, so as to involve great danger of the collision of trains, held, that such construction should not be permitted, except under some paramount necessity for the service of the public or the state.
4. Where a right of way over private property, or the right of crossing a public highway, has been acquired, certain common rights attach to the acquisition, which may be protected and enforced between proper parties in a court of the United States; but to acquire such rights, resort must be had to the courts of the state.

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IN EQUITY. Heard upon motion for injunction *pendente lite*.

Messrs. W. H. Herman, Olin Welborn, W. W. Leake, J. L. Henry and R. C. Foster, for complainant.

Messrs. R. B. Hubbard, H. M. Whitaker, Chas. Z. Bonner, George Clark and J. L. Dyer, for defendant.

MCCORMICK, District Judge. The complainant, in its bill and amended bill, avers in substance that it is a corporation duly organized under the laws of Kansas, and as such is also authorized, by act of the legislature of Texas, to extend its railroad and telegraph through Texas; that it is now engaged in extending its lines of railroad through Texas, having portions thereof in operation, and other portions located and in process of construction; that in January last it located its line through McLennan county and into the city of Waco, approaching the line of the Central Railroad at that point on a tract of land known as the Norris land, and in March last obtained from the proper party full title to the right of way over said land on complainant's said located line, and is now engaged in constructing its main line and side track on said Norris land, on said right of way; that defendant is a corporation created by the laws of Texas, and is also constructing its railroad through McLennan county and into the city of Waco, having originally located its line so as to approach said Central Railroad at a point some distance west of the point on the Central where complainant's line intersected the Central; that complainant's line crosses defendant's line at the distance of a little less than one mile from its intersection with the Central line, and from said point of crossing complainant's line, and defendant's line as originally located, gradually diverge from each other as they respectively approach the Central Railroad's line; that complainant and defendant were proceeding with the construction of their respective railroads on their respective lines as so originally located; that defendant failed to obtain the consent of the said Central road to have its railroad crossed at the

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point where defendant's line, as originally located and being constructed, would have crossed said Central road, and thereupon the defendant changed the location of its road so as to bring the same nearer to complainant's line, and to cross the Central at a point only a few feet west of the point at which complainant's line crosses said Central; that by said change of location, which change was made after complainant located its line, and had procured its said right of way on said Norris land, and was engaged in the construction of its said tracks thereon, complainant was disappointed in its purpose of effecting its connection with said Central road by putting in a "Y" on the west of complainant's line, leaving the space on the west thereof to be occupied by the defendant's main and connecting tracks; that, after some work had been done by defendant on its changed line, the defendant undertook, without first obtaining or asking complainant's consent, and without making, or offering to make, any compensation therefor to complainant, to cross said complainant's main and side tracks, and right of way on said Norris land, and extend its (defendant's) line to a point of intersection with said Central line east of complainant's line, and to return on the line of said Central's track and recross complainant's line, said last-named two crossings being not more than two hundred and ninety feet the one from the other, and making three crossings of complainant's main track and one of its side tracks within the space of one mile; that upon either side of its line the defendant can obtain as easy and practicable a route for its road, and space for its connections with said Central, without making either of said last-named crossings of complainant's line of main track and side track; that said last-named crossings are unnecessary, and could only be maintained at great expense, and would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any monied consideration; that the complainant had first located its line there, and procured its right of way, and being in the actual occupancy thereof, and engaged in the construction of its main track

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and side track thereon, requires the sole and unobstructed use thereof for its business, and to suffer such crossing there would work irreparable injury to complainant; that defendant is threatening and attempting violently to effect said crossing, against the objection and warning of complainant. And complainant's prayer is for an order restraining and enjoining defendant from making said crossings against complainant's objection, "and from attempting to compel by law a right to do so."

The answer in substance is — *First*, that complainant is not such a party as to the matters in issue as can sue the defendant in reference thereto in the circuit court of the United States; *second*, that defendant does not propose to cross complainant's line with defendant's main track, but only to lay a side track across the complainant's line to connect with the Central, and return with the Central line to defendant's main track; that defendant has found it impracticable to connect with the Central in any other manner, or at any other place; that defendant expects and now offers to make and maintain said crossing at defendant's expense, and that if not allowed to make its connection in that way with the Central, defendant will be greatly damaged.

On the question of jurisdiction, raised by the answer, the proof shows that the complainant was organized as a corporation under a general act of the state of Kansas, and that on the 2d of August, 1870, the legislature of Texas passed "An act in relation to the Missouri, Kansas & Texas Railway Company," giving said company the right to extend its railroad through the state of Texas, and among other things, not material here, providing:

"That the said company, in constructing, extending and operating its railroad and branches, shall have and exercise and are hereby vested with all the rights, powers, privileges and immunities granted by its acts of incorporation and amendments thereto, so far as the same may be applicable to this state, and not inconsistent with the constitution thereof, together with all the rights, powers, privileges and

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immunities conferred by all general laws now existing or that hereafter may be passed by the legislature of the state of Texas, in relation to railroad corporations, in same manner and to same extent as if incorporated by this state, provided the said company shall keep an office within the state."

This question has been treated by the supreme court as one full of difficulty and delicacy. In one of the earliest cases in which the right of a corporation to sue in the circuit court was entertained, the language of the opinion was nervously vigorous in rejecting the proposition that such a purely legal entity and artificial, intangible creature of the law of a state could be deemed a citizen of a state within the meaning of the constitution; but feeling under equal obligation to entertain jurisdiction in a proper case, and to decline to usurp jurisdiction in any case, it was held in that case, not without much misgiving, as we now know, that although such a creature of the law could not be a citizen, it might be (and in that case was) composed of real persons who were citizens, and that such citizens, their citizenship being such that suing in their own names the suit could be entertained, might sue in the corporate name which represented them. *Bank of The United States v. Deveaux*, 5 Cranch, 87.

In a later case it was considered that while the corporation was an intangible creature of the law, real persons having dealings with it encountered very real natural persons representing it in the state creating it, and that these real natural persons constituting its management were the parties in fact to its transactions and to its litigation, and that so contemplated, and for the purpose of determining the question of jurisdiction in suits, a corporation created by and doing business in a particular state is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person. And it has grown to be the settled doctrine that the real persons composing a corporation are conclusively presumed to be citizens of the state in-

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corporating it, and no inquiry in relation thereto is permitted. *Louisville Railroad Co. v. Letson*, 2 How., 497; *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How., 314; *Covington Draw Bridge Co. v. Shepard*, 20 How., 227. In a later case a new phase of the question was met, and it was held that where two states (Ohio and Indiana) had each chartered a corporation by the same name, and with the same capacities and powers, and intended to accomplish the same objects, and which was spoken of in the laws of said states respectively as one corporate body, exercising the same powers and fulfilling the same duties in both states, said corporate body cannot maintain a suit against a citizen of Ohio or Indiana in the circuit court. *Ohio & Miss. Railroad Co. v. Wheeler*, 1 Black, 286. Again, where a citizen of Illinois brought suit in Wisconsin against the Chicago & Northwestern Railway Company, a corporation created by and existing under the laws of the states of Wisconsin, Illinois and Michigan, operating its line in part in each of these states, the whole of the said line being managed by the defendant as a single corporation, whose principal office and place of business was in the city of Chicago, in the state of Illinois, on objection to the jurisdiction of the circuit court on the ground that the defendant was a citizen of Illinois (of which state plaintiff was a citizen), the objection was overruled, and it was held that in Wisconsin the defendant was a citizen of Wisconsin. *Railroad Company v. Whitten*, 13 Wall., 270.

In delivering the opinion of the court in the case just cited, Mr. Justice Field refers to a recent decision in the case of the *Railroad Company v. Harris*, 12 Wall., 65, as confirming the correctness of the positions taken in the opinion he was then delivering. The case of the *Railroad Company v. Harris*, 12 Wall., 65, presents a parallel, in all essential points, to the case here. The state of Maryland incorporated the Baltimore & Ohio Railroad. The state of Virginia passed an act reciting the Maryland act in full, and granting to the company the right to extend its road through the state of Virginia. Congress also passed acts referring to the Maryland act (but not recit-

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ing it), by which the company was authorized to extend a line of its road to the city of Washington, in the District of Columbia. Harris, a citizen of the District of Columbia, sued the company in the district on a cause of action growing out of the negligent handling (as alleged) of its trains at a named point in the state of Virginia. The company objected to the jurisdiction on the ground that, being chartered by Maryland, it was a citizen of that state; that it could not emigrate, and was not liable to suit in the district. On the case being considered in the supreme court there was a unanimous concurrence of opinion in favor of holding the company liable to the suit in the district, but some diversity of opinion as to the ground upon which that holding should repose; and the case was set down for reargument on the question as to the construction of the legislation of Virginia and of congress subsequent to that of Maryland originally incorporating the company; whether such subsequent legislation was a new birth, making the company a Virginia corporation in Virginia, and a corporation created by congress in the District of Columbia, or was such subsequent legislation only a license by which the field of the company's operation was extended; and, after this deliberate consideration, and full argument of counsel on this question,—the turning question in this case, and thought to be of the highest importance in that case,—the court held that the acts of Virginia and of congress did not incorporate said company, but only extended the field of its operations.

So far, then, as the rule has been developed by adjudged cases, it appears to be that where the act of a state provides for the organization and incorporation of a company it thereby becomes a corporation of that state, and in that state is a citizen thereof for the purposes of suit, although the same persons, by the same corporate name, have been incorporated, with the same powers and for the same object, by another state; but when the act does not create the corporation, and recognizes it as already existing by the laws of another state, and extends to it like powers (or such of them and with such

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limitations and on such condition as may be named) as are given it by the laws of the state incorporating it, such act must be construed to be only a license enlarging the field of operations of the company, and said company, upon extending its operations under such an act into the state passing such an act, does not become a corporation of that state, but goes there as the corporation of another state, liable to be sued in the state embracing the new field of its operations, but shorn of none of its qualities as a corporation of another state.

And if the act of Virginia, above referred to, did not incorporate the Baltimore & Ohio Railway in Virginia, and make it a Virginia corporation as to its operation in that state, surely the act of 1870 by this state did not make the complainant a Texas corporation as to its operations in this state. It remains a citizen of Kansas, and as such privileged to elect to sue in the United States courts.

On the merits of this controversy the parties in the bill and answer, and their respective assistant affidavits, indulge and exhibit much contrariety of view as to the facts; but I clearly gather from the affidavits, and from the bill and answer, that defendant has changed the location of its line substantially as alleged in the bill, and was threatening and attempting to push a side track across complainant's right of way, crossing the main track and side track of complainant so as to connect with the Central at a point east of complainant's line, and return with said Central's track to defendant's main line, which, at this point, is west of complainant's line, thus crossing complainant's line twice at points not more than two hundred and ninety feet apart, and less than one mile from the first crossing of complainant's and defendant's railroads; that defendant is advised by its engineer, and its other officers believe, that said connection with the Central is the only one practically possible to be made, and that complainant's engineer advises, and its officers believe, that just as easy and practicable connection with the Central can be made there by the defendant without so

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placing a side track across complainant's tracks; that complainant's consent so to cross was not asked, or any offer of compensation of any kind made complainant, but a violent and irregular and unusual effort was being made to push defendant's said track across complainant's right of way without asking any consent, and in defiance of complainant's warning to desist, and that at the time of submitting the bill both parties, with strong construction forces, were standing facing each other at the point in question, indulging the defendant in surprises and night attacks, and such tumult as put the local community in an uproar.

The defendant asserts its right to cross complainant's tracks and right of way without asking the favor or consent of complainant, and, of course, without resort to legal proceedings to compel such consent. This claim it rests upon this language of the constitution of Texas: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad."

Is this part of a sentence, taken from section 1, art. X, of the constitution, so far self-acting as to give the defendant a license to judge of its own ease, and execute its own judgment thereon? The language is general, as the language of constitutions usually is, and where such language is used to restrain action—as restraining execution from taking the homestead (defining the homestead), or to specify the powers of some branch of the government or of some officer,—it may well be held to be self-operating; but where it can operate only by affirmative action of private parties, and come in sharp conflict with other private interests, such a general provision needs supplementing by appropriate legislation prescribing the regulation of its exercise. I so construe this provision, and am of opinion that the defendant should be restrained from effecting said crossings of complainant's tracks until by negotiation, or by the proper legal proceedings, the defendant shall have fixed its right (with the prescribed or adjudicated limitations) to make said crossings.

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Stress is laid by defendant's counsel in his argument on the words "irreparable damage." It is hardly necessary, in this case, to indulge in any philological disquisition on this text. The most common experience has little need of the testimony of experts to aid it in reaching the conclusion that such crossings as this application seeks to have restrained would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any monied consideration, and such as should not be permitted except under the pressure of some paramount necessity for the service of the public convenience or of the state. The complainant insists that no such necessity exists, and asks this court to so adjudge, and to restrain the defendant from, resorting to other legal proceedings to compel a right to make said crossing. And in argument of its counsel I am referred to cases in 43 and 66 New York reports, where the court determined that the property in those cases sought to be condemned was not necessary to be devoted to the use of the companies seeking the condemnation. These cases repose on the language of the New York statute, and, besides this, are cases in the state courts, where, if at all, the right to enforce or refuse such claims to expropriation must, in my opinion, reside. When the right of way over private property, or the right of crossing an established public highway, has been acquired and fixed by the acts of the competent parties, either voluntarily contracting or judicially constrained to consent, then certain common rights attach to this new acquisition of right, and these common rights may be considered by and protected and enforced by this court in any case where the character of the parties brings the case within the jurisdiction of this court. But until this right of way is thus fixed, the claim to it is so far in derogation of common right as to require full compliance with all the regulations of the law under which it is claimed, including a resort to the particular tribunals by that law set for passing upon such claims and fixing such rights. If the circuit court of the United States can restrain parties from attempting to

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secure a right of way by process of condemnation under the state laws, could these courts not as well entertain and conduct the proceedings for such condemnation wherever such a party as this complainant was seeking to condemn, and the adverse party was a citizen of Texas?

In accordance with the foregoing views a temporary injunction will be ordered, but it will not restrain the defendant from attempting to compel by law a right to cross complainant's tracks and right of way.

AT CHAMBERS, MARCH, 1882.

TEXAS EXPRESS COMPANY v. TEXAS & PACIFIC RAILWAY
COMPANY

TEXAS EXPRESS COMPANY v. INTERNATIONAL & GREAT NORTH-
ERN RAILROAD COMPANY.

1. A contract by which a railroad company agrees to furnish an express company daily, for transportation of express matter, so large a space upon its cars as to disable the railroad company from serving other express companies equally entitled to be served, is illegal and void.
2. The contracts between railroad and express companies must be so framed as to graduate the compensation to be paid the former, by the number of persons, and quantity and, perhaps, quality of matter, transported, and so as not to discriminate between different express companies in the rates of fare and freight charged.
3. Articles 4256 and 4257, Revised Statutes of Texas, which establish reasonable maximum rates to be charged by railroad companies for the transportation of passengers and freight, do not apply to fares of express messengers or the freights of express matter.

IN EQUITY. Heard upon bill, affidavits, etc., for injunction *pendente lite*.

Messrs. Alexander White, Geo. H. Plowman and F. E. Whitfield, for complainant.

Messrs. Olin Welborn, W. W. Leake, J. L. Henry and J. A. Baker, for defendants.

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McCORMICK, District Judge. The complainant in these bills, after setting out its corporate existence, citizenship and powers, and the customary and well known usages of its business, and the nature of the trade done by express companies and by the complainant company, and also setting out the corporate existence, citizenship, powers and duties of the defendant corporations, shows in substance that the complainant has for a number of years past, and up to the presentation of its bill, been doing business on the lines of the defendants' railroads under contracts made and modified from time to time by the respective parties, and that recently both defendant corporations have given the complainant such notices (set out in the bill) as indicate a determination on the part of said defendants to terminate the contracts upon which complainant has been and is doing business on said lines; and plaintiff avers that in giving said notices said defendants had in view to lay a foundation for the ejection of complainant's express business from said railways, claiming and intending to assert the right in defendants to do the express business thereon themselves, or, excluding all other express companies, make an exclusive contract with one only.

Complainant shows the extent and irreparable nature of the injury that would result to it from such action as the defendants' conduct is averred to threaten, and prays in substance and with ample detail that the defendants may be decreed to permit the continuance of complainant's business on the lines of defendants' roads without molestation or hindrance, and on such reasonable terms as do not exceed the rates prescribed by the laws of Texas, and do not exceed the rates upon which other express matter is transported by the defendants, and upon the same trains upon which other express matter is transported; praying, also, that the defendants, their agents, officers and servants, be perpetually enjoined from refusing the complainant the facilities now enjoyed by the complainant in the conduct of its business on defendants' roads, and from excluding any of its express matter or messengers from defendants' depots, trains and cars, and from refusing to receive and transport, as the de-

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defendants are now doing, the express matter and messengers of the plaintiff, and from demanding from plaintiff, as a condition of shipment, the inspection of the contents of its packages, and from demanding from plaintiff a higher rate upon packed parcels, safes and chests than upon other freights of like weight or bulk, or charging for the transportation of its express matter otherwise than upon the weight thereof, or from otherwise charging a proportionally higher rate upon small than upon large packages, or from discriminating against plaintiff (in particulars exhaustively stated), or in any manner disturbing the business of plaintiff in its relations to defendants, so long as plaintiff shall pay therefor a reasonable compensation, not exceeding the rates prescribed in articles 4256 and 4257 of the Revised Statutes of the state of Texas.

Plaintiff also prays for a discovery, from the officers of the roads named and made defendants in the bills, by which the terms and conditions of any contract with the Pacific Express Company, or with any other company or persons, if any such exist, by and between said defendants and said Pacific Express Company, or other person or company, for the transportation of express matter. Plaintiff also prays for a provisional or preliminary injunction, to remain in force pending this suit, etc.

On the 1st of March, 1881, I made an order in each case directing the defendants, after service, to show cause before me at Dallas, on the 16th of March, why the provisional injunction asked should not issue; and that, in the meantime, the plaintiff should not be interrupted or discriminated against in its said business on the lines of said defendants' roads.

The issues being largely issues of law, and hardly affected appreciably by the slight differences in certain particulars of fact, both cases have been heard as one, neither of the defendants putting in an answer, as such, but submitting affidavits by the officers of the respective defendant railroads in the form of an answer, the officers of whom discovery was asked making full discovery as asked. The plaintiff has

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also submitted affidavits of C. T. Campbell, superintendent of plaintiff's business in Texas, in support of plaintiff's bill.

From the defendants' affidavits it appears that the defendants disclaim all right to eject the plaintiff from the lines of their respective roads, and deny entertaining any intention to discriminate against plaintiff. They exhibit fully contracts lately entered into by said roads respectively with the Pacific Express Company, and each of defendants' railroad companies testifies to its willingness to extend the same facilities and terms to the plaintiff, or any other express company, that their contract with the said Pacific Express Company engages them to extend to it.

From the contracts exhibited it appears that the International & Great Northern Railroad has engaged with the Pacific Express Company "to furnish said Pacific Express Company space in its baggage or express cars, to be hauled on passenger trains between Longview and San Antonio, for four thousand five hundred pounds of through freight, each way, each day that a train is run; and between Palestine and Houston for two thousand five hundred pounds of through freight, each way, each day that a train is run; and for one agent or messenger, who shall have charge of the express matter, and a safe for money and valuable packages,—for which the Pacific Express Company engages to pay \$150 for each and every day that a passenger train is run, and one-half first-class passenger fare for its agents or messengers. The Pacific Express Company engages to pay for any excess of weight one and one-half of the local first-class freight rates between the points carried, as per the freight tariff of said railroad in use at the time; and, in case of any deficiency in the through freight on any day, the Pacific Express Company is allowed to add enough way freight, figured at one and one-half the local (railroad) freight rates, to make up the deficiency.

The Texas & Pacific Railway Company, in its contract with the Pacific Express Company, permits said Pacific Express Company to do a general express business over all the lines of said Texas & Pacific Railway Company's road, as

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now completed, or as may hereafter be built, owned or controlled; and, besides other things not necessary to mention, agrees to furnish said Pacific Express Company sufficient space in its baggage or express cars, on all passenger trains, for the transportation of goods, merchandise, safes and messengers of said Pacific Express Company; and the Pacific Express Company agrees to pay one-half first-class passenger fare for the transportation of the messengers and the messengers' safes, and the following rates for the transportation of merchandise, packages, and other express matter, namely, for distances under fifteen miles, thirty cents per one hundred pounds; graduating rates for the different distances up to over four hundred and fifty and less than five hundred miles, which last are charged at \$1.90 per one hundred pounds; "it being understood and agreed that the payments for such transportation of merchandise, exclusive of messengers' fare, are to be not less than \$150 per day, without regard to the amount transported, for each and every day a passenger train is run for the lines as now completed,— the *fixed* amount to be paid as the lines of said railway companies are extended, to be agreed upon from time to time by the parties to this agreement."

It clearly appears from defendants' affidavits, as presented and discussed by defendants' counsel, that, by being willing and offering to furnish plaintiff and other express companies the same facilities on equal terms with the Pacific Express Company, said defendants' railroads embrace, in the terms they thus profess to offer, the payment, by any express company doing business on any portion of their respective lines, of the *fixed* daily sum of at least \$150 for each day a passenger train is run, and one-half first-class passenger fare for the whole length of their respective lines, each way (or one full first-class passenger fare for the whole length of their respective lines), each day a passenger train is run, for said company's messenger, without regard to the amount of the express matter said express company may wish hauled, or the length of the line over which said express company may desire to carry on its business. The lines of each of defend-

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ants' roads, now open to business, measure, in the aggregate, respectively, about six hundred miles. First-class passenger fare is limited in this state, and is now charged at the rate of five cents per mile. These contracts, therefore, when analyzed, mean the same thing, in the controlling point: that the Pacific Express Company shall pay each of the defendant railroad companies at least \$180 each day that a passenger train is run; and the equality of facilities and terms offered to all other persons or companies doing an express business is, that you can use all or any portions of our lines for the transportation of your express matter, provided that you, and each of you, pay us \$180 a day, without regard to the weight, bulk or quality of the matter we haul for you, or the length of the haul.

It is not at all difficult to comprehend that this is a species of equality that cannot fail to prove satisfactory to the minds of the management of these railroads, and that the degree of such satisfaction will be materially heightened by every addition to the number of persons or express companies doing an express business that accept and share these equal terms.

This contract with the Pacific Express Company by the Texas & Pacific Railroad Company appears to be the first fruits of "an avowed policy of his co-defendant (I quote the language of the vice-president of the company) for some months past, as soon as it could be done, to encourage competition in the carrying of express matter, so that the wants of the people could be met at cheaper rates than those which have heretofore prevailed."

That this species of equality would probably be so attractive to persons or companies doing an express business as to arouse their activity in competing for express business to be done on these lines, is not so apparent to my mind, and the ability, experience and gravity of the very learned and skilful counsel appearing for the defendants were not equal to the presentation of that view of the case. It was, therefore, contended, as it has been contended in cases presented to other

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judges during the past year (with which the courts and the legal profession have become somewhat familiar), that the certainty of having dispatch was a necessary element of the express business; that this could only be secured by having always a sufficiency of room; that as each express company would want all the business if it could get it, and as one might succeed in getting it all, that to insure always having room, each had to contract for all the room its business on any one day might need, and hence had to contract for room equal to something more than the average daily haul of such matter, and that the express business, and not the railroad company, should bear the burden of the dead hauls necessary to secure at all times this ample supply of room. And further, as to these cases, it was urged that the plaintiff, by its bill, showed that it was in possession of the express business on these lines; that it had an established reputation; that it had the good will of such business on those routes, with trained messengers and other servants known to the public and trusted by the public along said routes, with all the appliances for doing all of said business as it had done for many years; and that, this being so, whatever other express companies might suffer by any supposed inequality in such terms, the plaintiff could not complain; that if the Pacific Express Company — a stranger with no present run of business, and none of these elements conducive to procuring and transacting such business — could afford to make such a contract, surely the plaintiff could very much better afford it; that if there was any inequality it would manifestly work most strongly in favor of that express company which already was in possession of the trade.

It is not questioned that dispatch is one of the vital elements in the express business, and I do not question that, for the convenience of both parties, an express company may contract with a railroad company for such room daily, on passenger or other fast trains, as the railroad can furnish, without thereby excluding or discriminating against any other company or person doing an express business. This

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question of daily room for any one express company is, however, a subject of concern chiefly to the express company; the railroad company being only charged in its duty, as an exclusive carrier on a public highway, to study and ascertain the current volume of express business offering, and likely to offer, and provide adequate and reasonable accommodation for that business by whatever other agency or agencies, company or person, one or more, such express business is done, and solicits transportation; and it is by no means clear to my mind that the furnishing of one company any reasonable amount of room for adequate compensation would disable or embarrass the railroad company so as to prevent the railroad from providing adequate transportation for other parties equally entitled to have their matter transported; or, if such be the case, and it is conceded, as I believe it is in the arguments and affidavits in this case, that the defendants are bound to transport on equal terms for all persons or companies doing an express business, then I have no doubt that such a contract for daily room to any one person as disables the railroad from serving others equally entitled to be served, is, as to all such other persons or companies, illegal and void.

It appears from the affidavit of the plaintiff's superintendent, C. T. Campbell, that the volume of the express business actually done over the lines of the International & Great Northern Railroad last year (a year, he says, of unexampled activity in this as in all other trade) did not exceed an average daily haul of one thousand nine hundred and eighty-five pounds, and with said roads, as extended, the business of the current year will be not more than ten per cent. greater in weight of express matter to be transported on said lines than it was last year. To one not an expert in all the niceties of railroad management, it would more readily appear that, to contract with competing express companies that each should have each day room sufficient to carry nearly double the average daily haul, for all parties, over the road of express, if the contract on the part of the railroad was actually so carried out as to sequester from the use of all others the room

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engaged to each, might soon and seriously trench upon the other interests and duties of the railroad. Nor does the suggestion that the plaintiff is in possession of the express business, and therefore in no situation to complain, strike me with force in the direction intended. On the contrary, in my judgment, the admitted facts in reference to the plaintiff's present relations to the express business, along the lines of defendants' road, tend rather to challenge criticism of the proposition, that, by these contracts with the Pacific Express Company, these railroads are pursuing a policy to encourage competition in the carriage of express matter, so that the wants of the public can be met at cheaper rates than those which have heretofore prevailed.

Not denying or questioning the right of the railroad to contract with any express company for adequate room daily for such an amount of express matter as it actually has from day to day, so long as such contract does not disable such railroad from granting equal daily facilities to any other express company soliciting the same accommodations on the same terms, and so long as all of such contract shall not disable such roads from furnishing adequate accommodations, in their due turn, to other companies or persons doing an express business and soliciting transportation for express matter, I am clearly of opinion that said railroad companies, when they do so contract, must so frame their contracts as to adjust the rate of compensation to the number of persons and quantity (and perhaps quality) of matter transported, and to the length of haul, and so as not to discriminate in favor of one or more companies or persons doing an express business against another or others engaged in a similar business.

As to the amount or rate of compensation, the plaintiff contends that such rates cannot exceed five cents per mile for the transportation of its messengers, and fifty cents per hundred pounds per hundred miles for transportation of its express matter, and relies upon articles 4256 and 4257 of the Texas Revised Statutes to support this contention.

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The provisions of the statutes upon which the plaintiff relies are the following:

Art. 4256. "No railroad company shall demand or receive for transporting a passenger over its line of road exceeding five cents for each mile or fraction of a mile it may transport such passenger." . . .

Art. 4257. "Railroad companies may charge and receive not exceeding the rate of fifty cents per hundred pounds per hundred miles for the transportation of freight over their roads, but the charges for transportation on each class or kind of freight shall be uniform, and no unjust discriminations in the rates or charges for the transportation of any freights shall be made against any person or place, on any railroad in this state; . . . *provided*, that when the distance from the place of shipment to the point of destination of any freights is fifty miles or less, a charge not exceeding thirty cents per hundred pounds may be made for the transportation thereof."

The correct construction of these provisions, and how far they affect the issue between these parties, is not free from difficulty. There is no literal exception in the statutes taking express matter out of its general terms used to embrace all commodities hauled by railroads. The only exception made in the statutes in direct and explicit terms is in reference to the mails of the United States, which are to be carried on such trains as the proper authorities of the postoffice department may require, and for such compensation as may be agreed on between the parties; or, in case they cannot agree, then at rates fixed by certain commissioners, at not less, when carried on passenger trains, than the rate for transporting an equal weight of matter on ordinary merchandise trains, with provisions for compensation for oar, extra speed, etc. Article 4235.

The legislature had full and minute knowledge of the existence and extent and manner of conducting the express business of the country, and was mindful to impose on every person, firm or association of persons doing an express busi-

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ness in this state an annual tax of \$750. Article 4665. The legislature, at least equally with the courts, had knowledge that express matter was carried in a particular manner on passenger and other fast trains, and not received, receipted for, or taken charge of, by any of the servants of the railroad corporations. The legislature had knowledge also that this business, as to the compensation to the railroads therefor, had ever been and continued to be regulated by special contracts between the railroad companies and the express companies. Express matter is nowhere in any way specially mentioned in the statute. It is not provided that such matter shall be carried on other trains than ordinary merchandise trains.

It is, perhaps, true that the terms of the statute do necessarily include all matter received by the railroads and transported in the care of its servants without regard to the quality of the matter or the train upon which it is carried. A railroad company could not, perhaps, receive a hundred pounds of fresh oysters in the shell at Galveston, and haul the same to Dallas, and (because its servants called it "express freight," and consented to haul it in a baggage car attached to a passenger train) charge more than fifty cents per hundred miles for the haul.

Upon a careful consideration of all the provisions of the Texas statutes bearing upon the subject, the inclination of my mind is to the opinion that it was not the intention of the legislature, in the legislation already had upon the subject of "establishing reasonable maximum rates of charges for the transportation of passengers and freight on railroads," to provide such maximum rates for the character of carriage claimed by the plaintiff. I therefore hold that there is no Texas statute reaching and governing the subject of these rates. If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judicial department of the government to do this. When and how far it may become necessary or expedient to do so

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must be left to the legislature to determine and declare; and until the legislature does so provide, the parties hereto, and all others similarly circumstanced, must be remitted to their right and power to contract in reference to the compensation for such service, subject to the limitations placed upon defendants by their duties as exclusive public carriers on public highways, that their terms for carrying shall be reasonable, and such as involve no unjust discrimination; to be determined in each particular case by the agreement of the parties in interest, and in case of their failing to agree, to be determined by the proper court on full statement and proof of the particular case.

In these cases a provisional injunction will be granted restraining the defendants as prayed in the bills, except as to the rate of compensation, and limiting that to such compensation as the parties may agree upon as being reasonable and not unjustly discriminating; or, in case of their failure to agree, requiring the parties to make such further application to the court as they may be advised is necessary to enable the court to fix what is and shall be reasonable compensation in reference to the particular matters about which they are so unable to agree.

JUNE TERM, 1882.

EX PARTE ADAM J. GEISLER.

The jurisdiction of the courts of the states to punish the passing, etc., of counterfeit coin with intent to defraud has not been excluded, but has been reserved and recognized, by the legislation of congress.

Petition for writ of *habeas corpus*.

Article 463 of the Revised Statutes of Texas of 1879 declares: "If any person, with intent to defraud, shall pass or offer to pass as true, or bring into this state or have in his possession with intent to pass as true, any counterfeit coin,

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knowing the same to be counterfeit, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

The petitioner was indicted in the district court of Grayson county, Texas, for a violation of this article of the state law, was tried and convicted, and sentenced by the court, in pursuance of the verdict of the jury, to imprisonment in the state penitentiary for the term of two years.

He now seeks discharge from imprisonment on the ground that the court by which he was tried and sentenced had no jurisdiction of the offense with which he was charged, and of which he was convicted.

Mr. S. W. Miner, for petitioner.

Woods, Circuit Justice. The ground upon which the jurisdiction of the state court is denied is, that the offense charged was an offense cognizable under the authority of the United States, and that the courts of the United States have exclusive jurisdiction thereof.

The judiciary act of 1789, section 11 (1 Stat., 78), provides that the circuit courts shall have . . . exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except when this act otherwise provides or the laws of the United States shall otherwise direct. The petition for *habeas corpus* is based on this section.

After the passage of the act of 1789, to wit, on March 3, 1825, an act was passed entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." 4 Stat., 115.

The 20th section of this act declared it to be an offense to pass, utter, publish or sell, or attempt to pass, utter, publish or sell as true, any false, forged or counterfeited coin, in the resemblance or similitude of the gold or silver coin which had been or might hereafter be coined at the mint of the United States.

This section, with a slight amendment incorporated therein

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by the acts of February 19, 1873 (17 Stat., 434), and the act of January 16, 1877 (19 Stat., 223), is still in force, and constitutes section 5457 of the United States Revised Statutes.

The 26th and last section of the act of 1825 declared, "nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction of the laws of the several states over offenses made punishable by this act.

This section is still in force, and appears in substance as section 5328 of the United States Revised Statutes.

Conceding what is unquestionably well settled, that congress may exclude the jurisdiction of the courts of the states from offenses within the power of congress to punish (*Houston v. Moore*, 5 Wheat., 1; *The Moses Taylor*, 4 Wall., 411; *Martin v. Hunter*, 1 Wheat., 304; *Commonwealth v. Fuller*, 8 Met., 313), it appears in respect to the offense of which the petitioner stands convicted, not only that congress has not excluded, but on the contrary has expressly reserved and recognized, the jurisdiction of the state courts.

The district court of Grayson county had, therefore, jurisdiction to try and sentence the petitioner for the offense with which he was charged and whereof he was convicted, and his imprisonment under such sentence is lawful.

The petition for the writ of *habeas corpus* must therefore be denied.

J. G. LAWRENCE v. A. BANNING NORTON AND OTHERS.

A suit brought in a state court upon the official bond of a United States marshal, in which the proper construction of the condition of the bond is made a question, is removable to the circuit court of the United States without regard to the citizenship of the parties.

Heard on motion to remand.

The Revised Statutes of the United States, section 783, require that "every marshal, before he enters upon the duties

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of his office, shall give bond with two good and sufficient sureties for the faithful performance of said duties by himself and his deputies."

In pursuance of this statute, A. Banning Norton, one of the defendants, having been nominated and appointed marshal of the United States for the northern district of Texas, executed his official bond, dated May 1, 1879, in the penalty of \$20,000, with the other defendants as sureties, conditioned as required by the statute.

During Norton's term of office, Lawrence, the plaintiff in this action, brought suit in the district court of Kaufman county, Texas, against Norton and his sureties, on the official bond of the former.

He alleged in his petition the appointment of Norton as marshal, the execution by him and his sureties of the official bond sued on, and then averred that Norton, acting by his deputy, Robert Clarke had, by virtue of a writ of attachment against the goods and chattels of one Samuel W. Wallace, issued out of the United States circuit court for the northern district of Texas, in a cause pending therein, in which Naumburg, Kraus, Lauer & Company were plaintiffs, and said Samuel W. Wallace was defendant, unlawfully levied upon and seized certain goods, the property of plaintiff, and in his rightful possession, and had deprived the plaintiff of the possession and use thereof; that by reason of said unlawful acts of Norton, and Clarke, his deputy, the condition of said bond had been broken, and an action had accrued to the plaintiff on said bond against Norton and the sureties thereon. He therefore prayed judgment against the defendants for the sum of \$10,000, his damages. All the parties were citizens of the state of Texas.

The defendants excepted to the petition on the following grounds among others:

(1) Because the sureties on the marshal's bond were joined as defendants, the petition not showing in what way they were liable, or that they had in any manner aided the mar-

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shal or his deputy in committing the trespasses set out in the petition.

(2) Because the petition averred that said alleged trespasses were committed by Clarke, the lawful deputy of the marshal, and alleged that the defendants were liable for the acts of the deputy marshal in seizing and taking possession of said goods.

After the filing of their exceptions, and within the time prescribed by the statute, the defendants filed a petition for the removal of the cause to the United States circuit court for the northern district of Texas; Kaufman county, where the action was commenced, lying within that district.

The state court made an order for the removal of the case, and the defendants in due time filed a transcript of the record in the United States circuit court. Thereupon the plaintiff moved the court to remand the cause to the state court.

Messrs. Olin Welborn, W. W. Leake and Jno. L. Henry,
for the motion.

Messrs. W. L. Crawford, M. L. Crawford and L. F. Smith,
contra.

Woods, Circuit Justice. The motion to remand must be overruled.

It is clear that by the exceptions filed to the petition of the plaintiff, a question is presented which arises under the laws of the United States, and consequently that under section 2 of the act of March 3, 1875 (Sup. to U. S. Rev. Stat., vol. 1, p. 174), the cause is removable without regard to the citizenship of the parties. The condition of the bond sued on is in strict conformity with the condition prescribed by section 783 of the United States Revised Statutes. The exceptions filed raise the question, what is the proper construction of the condition, and consequently what is the proper construction of section 783.

The court in passing upon the exceptions is required to decide what is meant by the words "the faithful perform-

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ance of said duties by himself and his deputies," as used in section 783, and to declare whether the acts complained of in the petition are or are not a violation of the condition of the bond prescribed by the statute. There can therefore be no doubt that the case is a removable one, and that the motion to remand should be overruled.

AT CHAMBERS, OCTOBER, 1882.

MISSOURI, KANSAS & TEXAS RAILROAD COMPANY V. SCOTT AND
OTHERS.

1. As a general rule (the exceptions noted), where a cause has been removed from a state court to a court of the United States, the latter court cannot enjoin further proceedings in the case by the state court.

(Before PARDEE and McCORMICK, JJ.)

IN EQUITY. Heard upon application for injunction *pendente lite*.

Mr. H. M. Herman, for complainant.

Mr. S. P. Greene, for defendant.

PARDEE, Circuit Judge. The hearing is on the bill and exhibits, so that all the matters of fact well pleaded may be taken as true. The bill makes a case showing that a proceeding or controversy was instituted in the county court of Tarrant county, under the laws of Texas, for the condemnation in favor of complainant of certain lands of the defendant Scott for right of way of complainant's railroad; that under the laws of Texas the preliminary proceedings had been had up to the report of the commissioners as to the amount of damages the defendant Scott was entitled to, and including the filing of objections to the report by the dissatisfied parties; that thereupon the complainant filed in said county court its petition and bond for removal of said cause to this court;

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that the defendant Scott, and defendants Henry Furman and J. Y. Hogsett, attorneys for Scott, and J. F. Swayne, clerk of the county court of Tarrant county, also made defendant, are proceeding with said cause in said county court, in defiance of the said petition and bond for removal of the cause to this court, and will continue to so proceed; that their said proceedings in said cause in said county court will annoy, harass and damage complainant, compelling it to litigate in two different jurisdictions, and, by causing delays, deprive complainant of certain rights and remedies it has against the International Improvement Railway Company under certain contracts made with that company. Further, that there is now pending in this court a suit brought by defendant Scott against complainant for title to the lands in controversy and for damages, and involving the same issues as the case sought to be removed from the county courts of Tarrant county.

Complainant asks for an injunction in the premises to restrain all of the defendants, Scott, the party to the suit, Furman and Hogsett, attorneys, and Swayne, clerk of the county court, "from taking any further proceedings in said county court, or filing or issuing any further papers, writs, precepts, or litigating, or forcing or compelling any litigation, or taking any further action of any kind or nature in said county or any other court in the state of Texas," etc.

Several grounds have been argued as conclusive against the right of complainant to an injunction as asked for, such as, whether the cause was removable at all from the county court of Tarrant county, whether the removal was asked for in time, and whether complainant's bill shows any equity entitling the complainant to an injunction. The conclusion we have reached renders it unnecessary to pass on these questions at this time. The injunction asked for is clearly and in terms one to restrain or stay proceedings in a state court. The federal courts are prohibited from granting such injunctions except in certain specified cases.

Section 720, Rev. Stat., provides: "The writ of injunction

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shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This statute prevents this court from granting the injunction asked for, even if complainant has otherwise a proper case for such relief. See *Haines v. Carpenter*, 91 U. S., 254. In so holding, it is not intended to decide that in proper cases, where the United States court is first seized of jurisdiction, and parties are instituting thereafter such proceedings in state or other courts as will, if successful, defeat the jurisdiction of the United States court, or deprive complainant therein of all benefit of any decree or judgment rendered in his favor, the United States court cannot by injunction lay its hands on parties, and control their proceedings, although thereby proceedings in a state court may be indirectly stayed or ended.

Such a case is that of *French v. Hay*, 22 Wall., 231. In that case the United States court had prior jurisdiction, and the enjoined party was seeking to execute, in a state court, a decree which to all intents and purposes had become the decree of the United States court, and had been annulled and vacated by the court. The case here, where we are asked to enjoin all further proceedings, etc., is one where the state court undoubtedly had prior jurisdiction, and the question as to whether that jurisdiction is ended is in dispute between the parties; the state court undoubtedly still claiming jurisdiction, notwithstanding the petition and bond filed therein to remove the case to this court.

The injunction asked for must be refused, and such order will be entered in the case.

McCORMICK, District Judge, concurred.

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DECEMBER TERM, 1882.

ADAMS V. ADDINGTON.

1. A promissory note in the usual form, but containing this further stipulation, "in case of legal proceedings on this note we agree to pay ten per cent. of the amount for attorney's fees," is a negotiable instrument under the law merchant, and the *bona fide* indorsee can enforce the stipulation against the makers.
2. The *bona fide* indorsee of a promissory note who has sued in the same action, both the maker and indorser may discontinue the suit as against the indorser, notwithstanding an issue raised by the maker that the indorser obtained the note from him by fraud.

This was an action brought by the plaintiffs, the holder, and indorsees against J. P. and Z. T. Addington, the makers, and Mullhall & Scaling, the payees and indorsers of a promissory note of which the following is a copy:

"GAINESVILLE, TEXAS, November 8, 1880.

"Seven months after date ——— or either of us promise to pay to Mullhall & Scaling, ten thousand, eight hundred and ninety-one 67-100 dollars, at the office of Putnam, Chandler & Co., in Gainesville, Texas, for value received, with interest, at the rate of one per cent. per month after maturity until paid, and in case of legal proceedings on this note, agree to pay ten per cent. of the amount for attorney's fees.

"\$10,891.67.

J. P. ADDINGTON,

"Z. T. ADDINGTON."

(Indorsed)

"MULLHALL & SCALING."

The cause was submitted to the court upon the facts as well as the law. The makers of the note had raised an issue between themselves and Mullhall & Scaling, the payees and indorsers, by which they alleged that the latter had obtained the note from them by fraud. The plaintiffs being *bona fide* holders for value, with a view to eliminate this controversy from the case, by leave of the court, dismissed their suit, as against the indorsers.

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The court found for the plaintiffs, and rendered judgment against the makers of the note for principal and interest, and ten per cent. on the principal of the note for attorney's fees.

The defendants then moved for a new trial — first, because as they contended, the note was not a negotiable instrument, and second, because the court erred in allowing plaintiffs to discontinue their suit, as against Mullhall & Scaling, the indorsers.

Messrs. S. Robinson and C. L. Potter, for the motion.

Messrs. W. L. Crawford, M. L. Crawford and L. F. Smith,
contra.

PARDEE, Circuit Judge. The note sued on was made in Texas, and was made payable in Texas. In that state it is a valid contract, and its stipulations can be enforced in the courts. *Miner v. Paris Ex. Bank*, 53 Tex., 559; *Roberts v. Palmore*, 41 Tex., 617. Therefore all questions of usury, public policy, costs, and penalties are eliminated from this case, and no point is left for discussion, save the question of the negotiability of the note. And this last question is one arising under the law merchant, where the courts of the United States are not bound by the decisions of the local courts under local statutes, but rather by the general principles of the commercial law. As shown by the note of Mr. Adelbert Hamilton to the case of *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep., 662, the weight of authority is in favor of the negotiability of instruments containing stipulations similar to those contained in the one here sued on. And, on principle, why should such instruments not be negotiable? The amount to be paid at maturity is fixed and certain.

As to what amount is to be paid in case of dishonor, and after maturity, there may be uncertainty depending upon contingencies. Is not the same true of every promissory note negotiable by the law merchant? The simplest one in form will carry with it an obligation to pay protest fees and interest in case of dishonor. The protest fees are contingent upon protest being made, and upon the number of indorsers

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notified. The interest payable is contingent upon time. Bills of exchange, which, in the matter of certainty of amount, stand upon the precise footing of promissory notes, carry with them an implied contract in case of dishonor to pay notarial expenses and interest (and in case of foreign bills payable abroad), re-exchange and expenses besides. That makers of promissory notes may make stipulations affecting their liability and the remedies to be taken against them in case of dishonor, and after maturity, without destroying the negotiable character of the notes, seems to be well settled. A note in the usual form to which is added, "Waiving right of appeal and of all valuation and exemption laws," is negotiable. *Zimmerman v. Anderson*, 67 Pa. St., 421; *Woollen v. Ulrich*, 64 Ind., 120. So is one with a power of attorney to confess judgment attached. *Osborn v. Hawley*, 19 Ohio, 130; *Cushman v. Welsh*, 19 Ohio St., 536; *Kirk v. Dodge Co. Ins. Co.*, 39 Wis., 138. So is one directing the appropriation of the proceeds of the note. *Treat v. Cooper*, 22 Me., 203. Likewise a stipulation may be made that no interest shall accrue prior to a certain date (*Helmer v. Krolick*, 36 Mich., 371), or, if not paid at maturity, the note shall bear interest at an increased rate. *Houghton v. Francis*, 29 Ill., 244; *Towne v. Rice*, 122 Mass., 67; *Parker v. Plymell*, 23 Kan., 402.

In *Towne v. Rice*, *supra*, a note in the terms following was held to be negotiable:

"\$11,520.42.

Boston, July 1, 1873.

"Four months after date we promise to pay to Louis Rice, receiver, or order, eleven thousand, five hundred twenty and 42-100 dollars, for value received, with interest at the rate of 2 per cent. per month after due, having deposited with the holders as collateral security, with authority to sell the same at the brokers' board, or at public or private sale, at his option, on the non-performance of this promise, and without notice, (23) twenty-three receivers' certificates of indebtedness, \$1,000 each, of the Alabama & Chattanooga Railroad."

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In *Arnold v. Rock River Valley U. R. Co.*, 5 Duer, 207, in addition to above, the note provided that a person, not the promisee, should hold and sell the collateral security, and this stipulation in addition:

"And in case the proceeds thereof, after paying the principal and interest thereon with all expenses of sale, shall be insufficient, we hold ourselves bound to pay the balance on demand;" and this note was held negotiable.

In all the foregoing instances of notes and bills of exchange, the amount to be paid at maturity was certain; the collateral or additional contract, embodied in the instrument or supplied by the law, relating solely to the amount promised to be paid, and in the contingency of dishonor, and expenses thereby incurred. Now, if negotiable instruments may carry with them, either as "ballast" or "baggage," a collateral contract in case of dishonor to pay reduced or increased interest, to waive delays and homestead exemptions, to confess judgment, to appropriate the proceeds, to sell collateral securities, to pay (in cases of bills) re-exchange and expenses, all without losing their negotiable character, there is no principle founded in reason which shall declare a promissory note to be not negotiable because it contains a collateral contract that in case of dishonor the maker shall pay the expenses directly resulting from his own miscarriage or default.

It seems to me, both on principle and authority, we properly ruled on the trial of this case that the note sued on was negotiable. If the note was negotiable, the plaintiffs, who are innocent holders, may enforce the stipulation for attorneys' fees against the maker. *Hubbard v. Harrison*, 38 Ind., 323; *Bank of British N. A. v. Ellis*, 6 Sawy., 96; [S. C. 2 Fed. Rep., 44]; *Daniell*, Neg. Inst., § 62; and see *Miner v. Paris Ex. Bank*, 53 Tex., 559.

The remaining question in this case is, whether the court ruled correctly on the right of plaintiffs, prior to the trial, to discontinue against indorsers who were not necessary parties defendant to the suit.

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The question arises under the Texas practice (article 1259, Rev. Code), to the effect:

“The court may permit the plaintiff to discontinue his suit as to one or more of several defendants who may have been served with process, or who may have answered when such discontinuance would not operate to the prejudice of the other defendants.”

It is claimed that defendants had made an issue with the indorsers of the note as to fraud in obtaining possession of the same, thereby making the indorsers primarily liable, remitting defendants to the position of sureties, and, under the articles 3662 to 3668 of the Texas Code, defendants had the right to litigate that issue in the suit, brought by plaintiffs against both makers and indorsers.

It is conceded that plaintiffs need not have sued the indorsers, but having done so, it is urged that they must now stand by and await indefinite litigation in no wise affecting them or their interests. The position of the parties as makers, indorsers, and holders of negotiable paper cannot be affected in this court by the Texas statutes in relation to principal and surety.

Under the law merchant, which in this court controls the liabilities of the parties, the Addingtons stand to the plaintiffs in the position of principals in the note sued on, and the plaintiffs ought not, against their consent, to be dragged off into a litigation to determine the fraud between the makers and indorsers. The discontinuance does not interfere with the rights of the defendants to pursue the indorsers who may have defrauded them, and therefore I do not think that legally it operated to their prejudice. And I understand this ruling to be in accord with the practice in the state courts, as declared by the supreme court of the state. See *Shipman v. Allee*, 29 Tex., 17; *Cook v. Phillips*, 18 Tex., 31; *Austin v. Jordan*, 5 Tex., 130; *Anderson v. Duffield*, 8 Tex., 237; *Horton v. Wheeler*, 17 Tex., 52. These cases declare the rule:

“That where a defendant need not have been joined, and

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the liability of the defendants is such that an action can be maintained against the others without joining him, the plaintiff may enter a *nolle prosequi* as to such defendant, and have his judgment against the others."

For all the foregoing reasons the motion for a new trial is denied.

SNOW AND OTHERS V. THE TEXAS TRUNK RAILROAD COMPANY AND OTHERS.

1. By the statute law of Texas, when a suit is brought against a railroad company to enforce a laborers' lien, lien holders, other than the plaintiffs, have the right to intervene without leave of the court.
2. When such other lien holders had applied for leave to intervene, which had been refused, and had, without leave, filed petitions asserting their liens, they thereby became parties to the suit.
3. Citizens of the state of Texas claiming to hold laborers' liens upon the property of a railroad company, also a citizen of that state, filed their petition in a state court against the railroad company, asserting their liens and praying for a receiver, etc. Certain other lien holders, citizens of other states, intervened and set up liens against the property of the railroad company, and alleged that their liens were superior to those of the original plaintiffs, and prayed relief accordingly. *Held*, that there was a controversy in this case wholly between citizens of different states, and that the cause was removable.
4. The suit was begun at the December term of the state court, and a receiver was appointed. At the next (June) term, before any issue joined or trial of the cause between the original parties, certain intervenors filed their interventions, and immediately petitioned for the removal of the cause to the circuit court of the United States. *Held*, that the petition for removal was filed in due season.

(Before PARDEE and McCORMICK, JJ.)

The plaintiffs, all citizens of the state of Texas, were holders of laborers' liens against the defendant railroad company which was a corporation organized under the laws of Texas, and a citizen of that state. At the December term, 1881, they filed their petitions in the Kaufman county district

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court, asserting their liens upon the property of the railroad company, and prayed for the appointment of a receiver to manage the business of the company — which was alleged to be insolvent — until the liens of the plaintiff could be paid from the earnings of the railroad or other assets of the company, or until the plaintiffs could obtain judgments in other suits instituted on their claims. A receiver was appointed as prayed for.

At the next term (June, 1882), before any issue was raised or other proceedings preparatory to the trial of the case were taken, certain citizens of other states, claiming to hold liens upon the property of the railroad company, presented petitions in which they asserted their liens, and averred that the same were superior to the liens of the original plaintiffs, and praying for relief, etc., and asked the leave of the court to intervene and file said petitions. Leave was refused. They thereupon filed their petitions without leave, and immediately filed a petition and bond for the removal of the case to the circuit court of the United States. On the first day of the then next session of said circuit court they filed therein a copy of the record of the suit. The original plaintiffs thereupon moved to remand the suit to the state court.

Messrs. Sawnie, Robertson and Z. T. Adams, for the motion.

Messrs. Alexander White and Geo. H. Plowman, contra.

PARDEE, Circuit Judge. The motion to remand this case to the state court from which it was removed here is based on these grounds: (1) That the persons who filed the petition and bond for removal were not parties to the suit, because they were not necessary parties, and were not made parties, and their petition to intervene had been rejected and denied by the court; (2) that the application to remove was not made before or at the term at which the cause could be first tried; (3) that in the suit there is no controversy which is wholly between citizens of different states, and which can be fully determined as between them.

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The record shows that Stepath *et al.*, by petition filed in the court showing that they were lien holders against the defendant railroad company, applied to the court for leave to intervene and litigate their alleged rights, and were refused by the court, and that thereafter, on the next day, without leave, they filed their petition asserting their claims against the defendant company, and contesting the lien and alleged priority of the plaintiffs in the suit.

The question is whether an order of court was necessary before they could be parties to the suit. We are referred to no provision of the Texas Code which makes it necessary for the court to grant leave before a party can intervene in a suit. We take it there is no such provision. We are referred to 28 Tex., 497 (*Smith v. Allen*), where it is said that "it is believed that the practice has been to intervene on leave of the court;" and referring to *Eccles v. Hill*, 13 Tex., 65. The court also said: "In a proper case the right of intervention, if denied in the court below, will be secured and enforced in this court." These rulings are undoubtedly with reference to the general practice in matters of intervention. But we understand that this case stands upon a clear statutory right to intervene, without any leave of court first had and obtained. The statute of the state which gives the plaintiffs the lien they are seeking to enforce provides that, "in all suits of this kind"—that is, suits to enforce the laborers' lien against railroad companies,— "it shall not be necessary for the plaintiff to make other lien holders defendants thereto, but such lien holders may intervene and become parties thereto, and have their respective rights adjusted and determined by the court." Acts 1879, c. 12, p. 8.

Under this provision it seems to us that any lien holder would have the right to intervene in such a suit as the plaintiffs instituted without any leave of court; as much so as a defendant, when cited in an ordinary suit, has to answer without leave of the court. But, however this may be, we have authority for holding that intervenors were proper parties to the litigation, and that as they had done all they

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could to become parties, and had been wrongfully refused the right by the state court, they were parties sufficient for the purpose of removing the case, if otherwise they had the right to remove the case. See Acts 1879, c. 12, *supra*, and two cases decided by Mr. Justice Davis, in Dill. Rem. Causes, 41, 42, note.

The petition and bond for removal were filed at the term at which intervenors first appeared, and before the trial of the case. It is probable that this is sufficient as to time of application; but it is not necessary to go so far in this case. The original petition was filed and service accepted at the December term of the Kaufman county district court, 1881; but no further proceedings, looking to an issue on trial, were had at that term. The next term was in June, 1882; at that time the intervenors appeared with their application for the removal of the case. Further than this, the original petition does not look to or contemplate any trial, and no relief is sought save the appointment of a receiver to manage the affairs of an alleged insolvent railroad company, until the plaintiff's lien can be paid from the earnings of the road or assets of the company, or until plaintiffs could obtain judgment in other suits instituted on their respective claims,

The case as made by the record shows a controversy between intervenors and the defendant's railroad company, for the foreclosure of the lien claimed by intervenors, and a controversy between the intervenors and the original plaintiffs as to which party is entitled to priority of lien against the defendant company. All the intervenors are citizens of other states than Texas; all of the plaintiffs and the defendants are citizens of Texas; there is no question but that these controversies can be fully determined as between the respective parties to them. We then have a controversy between citizens of different states; a controversy between citizens of a state and citizens of other states; and a controversy which is wholly between citizens of different states and which can be fully determined as between them.

For the purpose of removal of a cause, the matter in dis-

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pute may be ascertained, and according to the facts the parties arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side being all citizens of different states from those on the other, desire a removal, the suit may be removed. *Removal Cases*, 100 U. S., 457.

When, in any suit mentioned in the second section of the act of March 3, 1875, there is a controversy wholly between citizens of different states, which can be fully determined as between them, then either one or more of the defendants or plaintiffs actually interested in said controversy may, on complying with the requirements of the statute, remove the entire suit. See *Barney v. Latham*, 103 U. S., 205.

We understand that in this case all the parties interested on one side of the controversy, and all being citizens of other states than Texas, have applied for the removal as against the parties on the other side, who are all citizens of Texas. If this is so, then this case was properly removed under the first clause of section 2 of the act of 1875. If all the parties on one side have not applied for the removal, then the case was properly removed under the second clause of the second section of said act. And we take this occasion to remark that, in our opinion, the proceedings disclosed by the record in this case eminently justify the wisdom of the removal acts of the United States. The intervenors are conceded to be large lien holders against the defendant company; they reside in distant states. Without notice to them on comparatively small liens, the property on which their liens rest is seized by the consent of the defendants and put in the hands of a receiver to be managed indefinitely. They have no remedy to assert their rights in any other court than the one having custody of the property. That court, in defiance of specific statutory rights, refuses to hear their claims or adjust their rights. They may have had a remedy by appeal to the supreme court of the state, but it was wise policy, under the constitution and laws of the United States, to give them a choice of tribunals. "In the national courts

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they may hope to escape the local influence which sometimes disturbs the even flow of justice." See *Davis v. Gray*, 16 Wall., 203.

The motion to remand in this case is denied.

McCORMICK, District Judge, concurred.

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An action of trespass brought against a defendant who was United States marshal for acts done by his deputy, in which the defendant pleaded that the alleged trespasses were acts done by him as marshal by authority of a writ issued from a court of the United States is removable from the state to a United States court.
(Before PARDEE and McCORMICK, JJ.)

The defendant was marshal of the northern district of Texas. As such there came into his hands a writ of attachment issued by the circuit court of said district against the property of one Ryan. By virtue of the writ, Clark, a deputy of the defendant, seized a lot of goods which the plaintiff Ellis claimed to be his property, and thereupon brought this action of trespass against the defendant alleging that the defendant, through his said deputy, had trespassed upon his, the plaintiff's, property, and demanding his damages. The defendant answered, alleging that the property seized was the property of Ryan, and setting up the writ of attachment in justification. Having answered, he filed a petition for the removal of the cause to the circuit court of the United States, stating as ground of removal that in doing the acts complained of he, through his deputy, was acting as marshal of the United States, under authority of process issued from a court of the United States. The cause was removed upon this petition, and the record having been filed in the circuit court, the plaintiff moved to remand the cause to the state court.

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HAGGART V. RANGER.

1. The power of sale conferred on trustees in a deed of trust executed to secure a debt is not suspended by the insanity of the grantor, occurring after the execution of the deed, and a sale made during such insanity will not be avoided, although the insanity of the grantor was known to the trustees and the beneficiary of the deed.
2. Such sale, if made in pursuance of the directions of the deed of trust, will not be set aside on the ground of inadequacy of price, no fraud being charged.

(Before PARDEE and MCCORMICK, JJ.)

IN EQUITY. Heard on demurrer to the bill.

The substance of the bill was as follows: The complainant, to secure a debt owing by him to the defendant, and evidenced by a promissory note, executed a deed, conveying a large tract of land to trustees, with power to sell the lands so conveyed in case the note was not paid when due, and to apply the proceeds of the sale to the payment thereof. The note not having been paid at maturity, and still remaining unpaid, the trustees, in pursuance of the directions of the deed of trust, sold said lands, and the defendant became the purchaser thereof at the price of about ten cents per acre, and the trustees conveyed the lands to him. At the time of the sale, and for eight months previous, and many months subsequent thereto, the complainant was in an unsound state of mind, so as to be incapable of attending to his affairs, and the fact of his said mental unsoundness was known to the trustees and the defendant when the sale was made, and the said lands were at the time of the sale worth \$2 per acre. The sale was made at the instigation of defendant, so that he might subject all of said lands to the satisfaction of his debt which he well knew he could not have done if the complainant had been in possession of his mental faculties.

The bill prayed that the sale might be set aside upon such terms as to the court might seem equitable and just.

Messrs. Sawnie, Robertson, C. G. Payne, H. Barksdale and D. A. Williams, for complainant.

Messrs. Z. Hunt and A. S. Lathorp, for defendant.

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McCORMICK, District Judge. We think the demurrer well taken. The power to sell the lands given in the deed of trust mentioned is certainly such a power as would be held at common law to have coupled with it an interest in the lands mentioned in the power, and would authorize its execution even after the death of the donor of the power. In this state it is held that such a power cannot be executed after the death of the donor, but this rule here is based on the Texas statutes regulating the administration of the estates of deceased persons. These statutes give priority to funeral expenses, expenses of last sickness, allowances to the family, etc., over all other indebtedness (except, perhaps, for purchase money), and they make special provision for the execution of just such contracts and liens as this by administration. *Robertson v. Paul*, 16 Tex., 472.

In the case just cited, the power under consideration was precisely similar to the one given Jack and Mott, under consideration by us in this case, and Judge Wheeler, in his opinion in that case, clearly indicates his opinion that in Texas, the common law being the rule of decision here, such a power could be executed after the death of the grantor, but for its contravening our system of administration of decedents' estates.

A careful examination of the Texas statutes does not disclose any such provisions in reference to insane persons, or in regard to the management of the estates of persons of unsound mind, as those provisions of the law regulating the administration of the estate of deceased persons, which have been held in *Robertson v. Paul*, *supra*, and in subsequent cases in the Texas reports, to cause the power to determine upon the death of the grantor. It is not necessary for us to consider what might have been the effect upon this power had the complainant been found insane by proper inquest, and guardianship of his estate granted by the proper court. We are clearly of opinion that the condition of complainant presented by the bill was not such as arrested or suspended the power granted by him in the deed of trust.

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No element of fraud is presented in the bill. The mere fact of making the sale while complainant was in the condition alleged, with knowledge thereof on the part of the defendant and of the trustees, is all that is charged in that direction.

The inadequacy of price complained of does not appear to have resulted from any improper act of defendant. From all that appears, the sale was made precisely as the complainant had provided it should be made, and the defendant became the purchaser because he was willing to give more for the land, and at the sale, offered more for the land than any one else offered, and no reason suggests itself to us for setting aside the sale on that ground.

The demurrer is sustained.

PARDEE, Circuit Judge, concurred.

PACIFIC RAILWAY IMPROVEMENT CO. v. METCALF AND OTHERS.

The act of congress (1 Sup. to Rev. Stat., 415), and the acts amendatory thereof (id., 490, 550), in so far as they restrict the return of process in civil cases in the northern district of Texas, to places therein mentioned, apply only to the district and not to the circuit courts.
(Before PARDEE and McCORMICK, JJ.)

Heard on demurrer to plea to the jurisdiction.

Mr. H. M. Hermann, for plaintiff.

Mr. J. S. Strangham, for defendants.

PARDEE, Circuit Judge. This suit is brought in this court at this place by the plaintiff, an alleged citizen of the state of Connecticut, against the defendants, alleged citizens of Palo Pinto county, in this district. The defendants demur to the jurisdiction of the court, on the ground that under the act of congress creating the northern district of Texas, (Sup. Rev. St. 415), and the acts amendatory thereof (id. 490, 550), the defendants, as citizens of Palo Pinto county,

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can only be sued in the circuit court of the northern district of Texas, at Graham, in said district, and that this circuit court, sitting at Dallas, has no jurisdiction over defendants as such citizens of Palo Pinto county.

An examination of the said statutes brings us to the conclusion that all of the provisions of the said act, restricting the return of process in civil cases to particular places in said district, apply only to the district court; except, perhaps, for the county of Jackson, in the eastern, and certain counties in the western district. In fact, the original act does not refer to the circuit courts, as then none were established for the northern district.

The first amendatory act goes no further, so far as the circuit court is concerned, than to attach the newly-created district to the fifth circuit, and provide for the times when and the places where the circuit court for the district shall be held.

The second amendatory act provides only with regard to the trial of criminal offenses.

The general statute establishing circuit courts provides:

"Circuit courts are established as follows: one for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi, and one for each district in the states not herein named,—and shall be called the circuit courts for the districts for which they are established." Rev. St. § 608.

The amendatory act (Sup. Rev. St. 490, *supra*), which establishes the circuit courts in the northern district of Texas, does not establish more than one circuit court in the district, and does not save to the citizen of said district the right to be sued in the circuit court only at certain places therein.

We can understand, easily, from the general phraseology of the several acts referred to, that the intention to create several divisions in the northern district, in which residents could only be sued in the circuit courts, existed in the minds of whoever drew the acts in question, but congress did not carry this intention into the law actually passed

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The only restriction that we find as to the place where parties may be sued in the circuit courts of the United States is found in the jurisdiction act of March 3, 1875, which, for this and like cases, provides: "And no civil suit shall be brought before either of said courts against any persons, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided;" from all of which it follows that this suit was rightfully instituted in this court, and the demurrer should be overruled.

McCORMICK, District Judge, concurred.

LAWRENCE V. NORTON.

A deed of assignment by which all the property of the assignee, not subject to forced sale, is conveyed to a trustee in trust to pay the proceeds thereof *pro rata* among such creditors of the assignor as should receive the sums so paid in satisfaction of their claims, and the residue, if any, to the assignor, is fraudulent and void under the laws of Texas.

(Before PARDEE and McCORMICK, JJ.)

One S. W. Wallace, a citizen of Kaufman county, in the state of Texas, on October 24, 1881, made an assignment of all his property, both real and personal, and wherever situate, except such as was by the laws of Texas exempt from forced sale, to I. G. Lawrence in trust to dispose of the proceeds thereof as follows:

First. To pay the costs and expenses of executing the trust, etc.

Second. To distribute and pay the remainder ratably and in proportion to the debts due them respectively to such creditors of the assignor as should accept the sums so paid in full satisfaction of their claims against the assignor.

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Third. To pay the residue, if any, to the assignor.

This action was brought by Lawrence; the assignee, to recover damages of Norton, the defendant, for seizing and converting certain goods which the plaintiff claimed were conveyed to him by said assignment. The petition of plaintiff, to show his title in goods seized, set out the deed of assignment. The defendant demurred to the petition.

Messrs. John L. Henry and J. J. Hill, for plaintiff.

Messrs. W. L. Crawford, M. L. Crawford, and L. F. Smith, for defendant.

PARDEE, Circuit Judge. The demurrer presents the question whether the foregoing assignment is fraudulent on its face, and therefore void as against the assignor's creditor. If it is valid, and should be carried out, and the trust administered according to the terms specified, its effect against creditors who do not grant the exacted release would be to delay them, according to the discretion of the assignee, for an indefinite period, in their remedies against the property upon faith of which they gave credit, if their remedies are not entirely lost; and, finally, after this indefinite delay, remit them to proceedings against their original debtor, after his assets had been converted into ready cash and put in his pocket beyond the reach of writs of *fieri facias*.

In short, in such case, the debtor has enacted a forced stay law, during the discretion of his agent, to enable him to convert his property into such convenient shape that he may enforce other terms (to suit his convenience) with his already delayed creditors. If the assignment is held valid, but the trust is administered according to the state laws, which, it is argued, have the effect to validate all assignments, curing all frauds, in act or intent, and, to a certain extent, making a contract for the assignor, the effect is practically the same, except that if there is any surplus, after preferred creditors and expenses, etc., are paid, it may be paid into court to be litigated for.

In this latter case, as to the administration under the state

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law, a number of curious queries suggest themselves, which, if they were satisfactorily answered, might induce creditors to view assignments under the law with more favor. When and where is the assignment to be recorded? When is it to take effect? How long may the assignee carry it in his pocket? Suppose that no creditor accepts the terms of the debtor, could the assignment be set aside? If so, when? After the full administration of the assignee, or at the expiration of four months? When is a dividend to be paid to accepting creditors? When the assignee can pay ten per cent. of the accepting creditors' claims, or when he has funds in hand sufficient to pay ten per cent. "of the debt due by the assignor?" Suppose the assignee can collect only enough after reasonable compensation, necessary costs and expenses, and attorneys' fees, at discretion, are paid, to pay nine per cent. of the debts due by the assignor?

Many other questions suggest themselves, but all, including the foregoing, throw no light on this case, they being referred to only because the policy of the law has been discussed at the bar, and very ably justified and defended too.

The assignment aforesaid makes several dispositions and conditions in conflict with the law which is relied on to maintain it, but the chief objection made to its validity is, that the assignment is not complete of the assignor's interest, but that the assignor reserves an interest in his own favor in the property assigned.

The act of March 24, 1879 (Texas Laws, Acts 1879, c. 53, p. 57), provides:

"Section 1. That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided for, a distribution of all his real and personal estate, other than that which is by law exempt from execution, among *all* his creditors in proportion to their respective claims; and however made, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged

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and certified, and recorded in the same manner as is provided by law in conveyance of real estate or other property.

“Sec. 3. Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportionate share of his estate, and discharge him from their respective claims; and, in such case, the benefit of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be, and stand discharged, from all further liability to such consenting creditors, on account of their respective claims, and when paid, they shall execute and deliver to the assignee for the debtor, a release therefrom.”

Upon the construction of these two sections, and upon the common law, the validity of the aforesaid assignment depends. See article 3128, Rev. Code Texas.

It seems that by the section aforesaid two classes of assignments are allowed: Under the first section, assignments for the benefit of all the creditors, which are aided by the law, and naturally would be favored by the court; under the third section, assignments for the benefit of preferred creditors, who are preferred on their own election under stress of a penalty forfeiting their whole claim, which assignment is not in terms aided by law, and naturally is not favored by the courts. Prior to the act of 1879, an assignment, such as the one now under consideration, would have been adjudged void on its face, because therein the assignor reserved an interest in the estate assigned. See the leading cases in Texas: *Baldwin v. Peet*, 22 Tex., 708, and *Bailey v. Mills*, 27 Tex., 434. Also, *Barney v. Griffin*, 2 N. Y., 365; *Leitch v. Hollister*, 4 N. Y., 211.

In the last cited case it is said

“The effect of such an assignment is to withdraw the property of the debtor from legal process, and to compel creditors to await the execution of the trust before they can reach the surplus reserved to the former. As those who are excluded from the benefits of the assignment cannot enforce its execution, they are necessarily hindered and delayed, and

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consequently in legal contemplation defrauded. It is of no consequence whether the surplus is large or small, or whether anything remains after the payment of the preferred creditors; the creation of the trust shows that a surplus was in the contemplation of the parties, and its reservation for the benefit of the assignor is a fraud upon creditors."

These cases, and the arguments so clearly expressed, have lost no force by lapse of time. The statute aforesaid was passed in the light of them, and I think it must be construed in harmony with them. Counsel have handed in two late decisions of the supreme court of Texas, not yet reported, in which that learned tribunal has passed upon two cases arising under the statute aforesaid. The first — *Blum v. Wellborne* — goes to the extent of holding that an assignment that evidences an intention to pass to the assignee all of the property of the debtor, subject to forced sale, for the purpose of distribution among creditors, and is executed in substantial compliance with the requirements of the act, will be aided by the law as to form, and will not be avoided by fraud between the assignor and assignee in secreting and appropriating portions of the property assigned.

In the second case — *Donalu v. Fish Brothers* — it is held that the law cannot make an assignment for the debtor, but that it aids an assignment which evidences an intention of the debtor to comply with its provision; that the provisions of the third section of the act of 1879 must be construed in harmony with the principles laid down by the courts of the several states, in which it has been held, in the absence of a statute, that such restrictions upon the rights of the creditors generally might be imposed by the debtor; and that an assignment containing such restrictions, which does not of itself, or with the aid of the law, transfer all the debtor's property for the benefit of his creditors, is void upon its face.

Following these two cases, as to the construction to be given to the act of 1879, keeping in mind that the law cannot make a contract for the debtor, and that where a debtor

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seeks to force exactions from his creditors under the third section of the act, he must resign all of his property not exempt, I feel warranted in holding, under the lights to which the court refers me, and hereinbefore cited, that as in the assignment before the court, the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, the same is on its face null and void, and of no effect.

Under the principles of the civil law, declaring that the property of the debtor is the common pledge of all the creditors, which principles are sound in justice and equity, all laws and acts preferring creditors ought to be strictly construed, and always avoided, when not in strict compliance with the terms of the law. On general principles, therefore, I am of the opinion that the third section of the act of 1879, allowing an unfair and partial assignment, should be strictly construed, and, therefore, that the assignment in this case should be held null and void.

The other points argued need not be considered.

The demurrer to the amended original petition is sustained.

McCORMICK, District Judge, concurred.

WACO, OCTOBER TERM, 1883.

SHIRLEY V. WACO TAP RAILROAD COMPANY AND OTHERS.

1. Section 4265 of the Code of Texas provides : " No suit pending for or against any railroad company at the time that the sale may be made of its roadbed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company." *Held*, that when pending a suit against a railroad company, its property, etc., was sold out under a deed of trust, and its trustees were made parties defendant to the pending suit by virtue of said section, there was no abatement or revivor of the suit, nor was there the beginning of a new suit.

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2. When such suit was pending in a state court when the act of congress of March 3, 1875, was passed, and after its passage and before the trustees were made parties, a final judgment was rendered and afterwards reversed. *Held*, that it was too late for said trustees, they having been made parties defendant, to remove the cause to a court of the United States.

(Before PARDEE and McCORMICK, JJ.)

Heard upon motion to remand to the state court.

Mr. E. A. McKinney, for plaintiff.

Messrs. Alexander & Weaver, for defendant.

PARDEE, Circuit Judge. This suit was instituted in the district court of McLennan county, of this state, in 1870, by the plaintiff against the Waco Tap Railroad Company for a breach of contract. Pending the various proceedings including two trials and judgments, and two appeals to the supreme court of the state, the Houston & Texas Central Railroad Company, holding a deed in trust granted by the Waco Tap Railroad Company, sold the road out and became the purchaser, all of which resulted in making the Houston & Texas Central Railroad Company a party defendant to the original suit. After the last appeal, decided in 1880 and reported in 54 Tex., 125, resulting in a reversal of a judgment of the lower court and a remanding of the case, a consolidated and amended petition was filed, making John T. Flint and others, constituting the board of directors of the Waco Tap Railroad Company at the time of the sale in the proceedings under said trust deed, parties defendant, and asking against them as trustees for all the relief that the plaintiff could have demanded from the Waco Tap Railroad Company had it continued in existence. This last making of parties was done, and perhaps necessarily so, under the provisions of sections 4264 and 4265. Rev. Code of Texas, § 4264, provides that whenever a sale is made of the road-bed, track, franchise and chartered powers and privileges of a railroad company, as provided by the laws of Texas (unless other persons are named by some court or the legislature), the directors or managers of the sold-out company at the

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time of the sale shall be the trustees of the creditors to settle up the remaining business and affairs of the sold-out company, and as such trustees may sue and be sued, etc. Section 4265 reads:

“No suit pending for or against any railroad company at the time that the sale may be made of its road-bed, track, franchise and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the sold-out company.”

Citation was issued against the said trustees, who thereupon appeared in the state court and filed petition, affidavit and bond for the removal of the cause to this court, on the ground that the case involved a controversy between citizens of different states, the plaintiff being a citizen of the state of New York, and the defendants all citizens of the state of Texas. The transcript having been filed in this court, the plaintiff moves to remand the case on several grounds, only one of which, however, is it necessary to consider. It is objected that the petition for the removal came too late. The case was one pending or instituted at the time of the passage of the act of 1875, under which the removal was made. It was thereafter tried in the state court. Judgment was rendered, and the cause was carried by appeal to the supreme court of the state. The removal, therefore, came too late, unless the making of the trustees parties, so as to continue the suit in the name of the trustees under section 4265, was in effect the institution of a new suit against the defendant trustees so made parties. It can hardly be denied that the trustees made defendant could not have moved for the removal of the cause before they were made parties, and if they were entitled to remove the case they would have, after being cited, up to and during the term at which the case against them could be first tried (provided it was before the trial) within which to ask for the removal. So that if the defendant trustees had the right to remove the case at all, the removal was not too late, as it was applied for at the time of entering appearance.

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The whole question, then, turns upon the force and effect of said section 4265 of the Texas Code. We are of the opinion that under said section and the preceding ones, in relation to the effect of a sale of the road-bed, track, etc., of a railroad, there was no abatement of the suit then pending against the Waco Tap Railroad Company by the sale made to the Houston & Texas Central Railroad Company, and therefore there was no revivor even, when the defendant trustees were made parties, much less the beginning of another or new suit against any of the defendants. The language of the section 4265 expressly stipulates that there shall be no abatement of the pending suit; and, on principle and authority, if there had been an abatement and a revivor under the statute, no case being made against the trustees of the defunct corporation in *autre droit*, the new parties so made could not have removed the cause at the stage it had then reached. See *Clark v. Mathewson*, 12 Pet., 164. The new parties made in this case stand in the shoes of the defunct company they represent, and their citizenship is the same. The right to remove the case apparently existed for the defunct company on the grounds the trustees claim as making their right to remove the case. Had the defunct company desired to remove the case to this court, it should have taken the proper steps after the passage of the act of 1875, and before or at the term the cause was first ready to be tried in the state court. Not having taken the proper steps within that time, the right to remove was lost, and the company accepted the jurisdiction of the state court, beyond their power thereafter to decline it. The trustees made parties under section 4265, Rev. Code of Texas, have no other rights than the company had, and they are made parties to continue the old case without any abatement thereof, not to change the old case into the institution of a new suit.

The motion to remand is granted, and the proper order will be entered.

McCORMICK, District Judge, concurred.

SOUTHERN DISTRICT OF GEORGIA.

NOVEMBER TERM, 1877.

EINSTEIN, ECKMAN & Co., PLAINTIFFS IN ERROR. R. N. GOURDIN ET AL., ASSIGNEES, DEFENDANTS IN ERROR.

1. A contract between the firm of K. & H., carrying on a banking and brokerage business in Savannah, Georgia; and S., of Quincy, Florida, whereby the latter agreed to open a store in Quincy for the sale for cash or its equivalent in salable commodities of goods belonging to K. & H., and to devote his whole time to the business, and in consideration for his services S. was "to be entitled to have and receive an amount of money equivalent to one-half of the net profit on the sales actually made," does not provide for such a community of profits as would by operation of law constitute a partnership as to third persons between K. & H. and S.
2. A charge not applicable to any evidence in the case is properly refused.
3. A partnership as to third persons can only arise either by contract between the partners themselves, by implication of law arising from a contract which does not make them partners as to each other, but does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists.

ERROR to the District Court.

This suit was brought by the defendants in error as the assignees in bankruptcy of Ketchum & Hartridge, to recover the value, alleged to be \$1,133, of certain goods and merchandise which it was charged that Ketchum & Hartridge had, when insolvent and contemplating insolvency, and within four months of their adjudication as bankrupts, transferred and delivered to the plaintiffs in error, who were creditors of said firm, with a view to give them a preference, they, the said defendants in error, having, at the time of said transfer, reasonable cause to believe, and in fact well knowing, that

Ketchum & Hartridge were insolvent, and that the transfer was made in fraud of the bankrupt act.

On the trial of the cause in the district court, the jury returned a verdict for the plaintiffs for the sum of \$1,100 and interest from the commencement of the suit, on which the court rendered judgment. To reverse this judgment, this writ of error was brought.

The bill of exceptions showed that on November 27, 1872, the bankrupts, as partners under the firm name of Ketchum & Hartridge, of Chatham county, Georgia, entered into a contract in writing of that date, with one Alexander L. Smith, of Quincy, in the state of Florida, of which the following is a copy:

“STATE OF GEORGIA, *County of Chatham* :

“This agreement, made and entered into on this, the 27th day of November, 1872, between Miller Ketchum and Alfred L. Hartridge, copartners, using the firm name and style of Ketchum & Hartridge, of said state and county, of one part, and Alexander L. Smith, of Quincy, county of Gadsden, and state of Florida, of the other part: Witnesseth, that the said Smith agrees to open a store in said Quincy at once, for the sale of goods belonging to the said parties of the first part, and to devote his whole time and energies to the sale of said goods for cash, or its equivalent in salable commodities, only as the agent of and for the said parties of the first part. It is agreed that in consideration of the services of the said Smith in selling and disposing of said goods, wares and merchandise, he, the said Smith, is to be entitled to and to receive an amount of money equivalent to one-half of the net profit on the sale of the same actually made, and this agreement to be binding for six months.

“The said parties of the first part agree that they will keep up the said stock of goods, wares and merchandise in their said store to an amount estimated on the cost value of the same not exceeding \$4,000, goods to be forwarded to said store from time to time as the exigencies of the trade in said Quincy may require, up to the said limit.

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"The said Smith agrees, as such agent, to render to his said principals, the parties of the first part, monthly statements of stock on hand in said store, weekly returns of sales of said goods, and to remit proceeds of the sales of the same to his said principals at the end of each and every week.

"The said Smith also agrees in connection with the above business to solicit consignments of cotton to said parties of the first part as factors, and for such services is to receive the usual and customary return commission.

"In witness," etc.

To secure the faithful performance on his part of the said contract, Smith executed and delivered to Ketchum & Hartridge a bond with sureties in the penal sum of \$5,000.

Ketchum & Hartridge were a firm carrying on a banking, exchange and brokerage business in Savannah, Georgia. They were not engaged in the dry goods business in any place save in the town of Quincy, Florida, where the said Smith had opened a house for the sale of dry goods under said contract with them. The contract had never been made public, nor had its contents been disclosed to the plaintiffs in error or either of them. Smith had, as agent for Hartridge & Ketchum, bought from the plaintiffs in error, dry goods to the amount of \$1,134 on March 8, 1873, and on that day, as agent, drew a draft on Ketchum & Hartridge for said amount in payment for goods. The draft was accepted by Ketchum & Hartridge. The following is a copy of the draft:

"SAVANNAH, March 8, 1873.

"Four months after date, pay to the order of Einstein Eckman & Co., eleven hundred and thirty-four dollars, and charge same to account of A. L. SMITH, Agent.

"To KETCHUM & HARTRIDGE, Savannah, Ga."

Before this draft fell due, to wit, on April 10, 1873, Ketchum & Hartridge became insolvent, and their insolvency was generally known throughout Savannah, where the plaintiffs in error carried on business. Ketchum & Hartridge were adjudged bankrupts in June following.

Soon after the insolvency of Ketchum & Hartridge was known, one of the plaintiffs in error called on them about the payment of said draft, and proposed that if the draft could not be paid in money it should be paid by a restoration of the goods bought from the plaintiffs in error. Ketchum & Hartridge thereupon gave the plaintiffs in error an order upon Smith for goods to the value of said draft. The draft was returned to Ketchum & Hartridge, and the plaintiffs in error received from Smith at Quincy, Florida, goods to the value of said draft, some of which had been purchased from them and some had not. At the time of this transaction it was well known to Smith and to the plaintiffs in error that Ketchum & Hartridge were insolvent.

When Smith gave his draft on Ketchum & Hartridge as agent, to the plaintiffs in error, they charged the goods on their books to A. L. Smith, agent, but Smith did not directly disclose for whom he was agent.

Hartridge, of the firm of Ketchum & Hartridge, and Smith, both testified that the goods at Quincy, Florida, which were in the possession of Smith were the property of Ketchum & Hartridge, and that the business was carried on by Smith in strict accordance with the terms of the contract and was not in any respect carried on otherwise, and there was no contradictory testimony on these points.

On this state of facts the district court charged the jury that the compensation provided for Smith in the said contract between him and Ketchum & Hartridge was not such a community of profits as would, by operation of law, constitute a copartnership as to third persons between Smith and Ketchum & Hartridge.

The court refused to charge as requested by plaintiffs in error, "that at common law a simple community of profits will constitute a partnership."

The court also refused to charge as requested by plaintiffs in error, "that if there was a partnership in Florida between Ketchum & Hartridge and Smith, and a partnership in Savannah between Ketchum & Hartridge only, engaged in a dif-

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ferent character of business, that the two partnerships were distinct, and that the stock and assets of the Florida partnership would be first subject to the payment of the debts of the Florida firm, before any portion could be subjected to the payment of the debts of the Savannah firm."

The charge given and the refusals to charge as requested were assigned for error.

Messrs. S. Yates Levy and R. E. Lester, for plaintiffs in error.

Mr. Geo. A. Mercer, for defendants in error.

WOODS, Circuit Judge. I. The charge given by the court and complained of as erroneous was correct. The contract between Smith and Ketchum & Hartridge was plainly intended to make Smith the agent and not the partner of Ketchum & Hartridge. As between the parties to the instrument this was undoubtedly its effect. There was no such community of profits as would make the parties to the contract partners. Story on Partnership, secs. 23, 32, 33, 35 and 36; Code of Georgia, sec. 1890; *Sankey & Shorter v. The Columbus Iron Works*, 44 Ga., 228; *Bradley v. White*, 10 Met. (Mass.), 303; *Berthold v. Goldsmith*, 24 How., 536; 3 Kent's Com., marg. page 33.

II. The first charge refused was properly refused.

The only evidence to show on what terms Smith carried on the business for Ketchum & Hartridge is found in the contract between these parties, and there was no evidence to show that Smith had received any compensation whatever from Ketchum & Hartridge except according to the terms of the contract. The charge requested was therefore not applicable to any evidence in the case. It was purely abstract, and its only tendency could be to mislead the jury, and it was therefore properly refused. *Improvement Co. v. Munson*, 14 Wall., 442.

III. There was no evidence in the cause to which the second charge requested was applicable. There is nothing in the record to show that there was a word of proof tending to

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establish a partnership between Ketchum & Hartridge and Smith in Florida. The contract which was put in evidence clearly showed that as between the parties themselves and as to third persons, there was no partnership. Was there any act or declaration of either Ketchum & Hartridge or Smith by which they held themselves out to the plaintiffs in error or the public as partners? There is none such disclosed by the record.

If Smith, without disclosing his principals, had gone to the plaintiffs in error and purchased of them a stock of goods, he might have made himself liable as principal, but this would not have made him a partner of his principals.

A partnership as to third persons can only arise either by contract between the partners themselves, by implication of law arising from a contract which does not make them partners as to each other, but does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists.

There was no evidence in the record tending to show by either of these methods a partnership between Ketchum & Hartridge and Smith, either in Florida or anywhere else. The second charge requested was therefore not applicable to any testimony in the case and was properly declined.

There is no error in the record. The judgment of the district court is therefore affirmed.

APRIL TERM, 1880.

THE RELIANCE.

The explosion of the boilers of a steamboat while in charge of her officers and crew makes a *prima facie* case of negligence, which, unless rebutted, entitles a passenger injured by the explosion, who is shown to have exercised reasonable care, to recover the damages sustained by him.

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ADMIRALTY APPEAL.

The Reliance was a passenger and freight steamboat, making regular trips by the inside route, between Jacksonville, Florida, and Savannah, Georgia. On September 3, 1878, about one o'clock P. M., she left Jacksonville, bound for Savannah. On that trip the libelant was a pay passenger. Between eleven and twelve o'clock on the night of that day, as the Reliance was going up the St. Mary's river, one of her boilers exploded. The result of the explosion was to throw overboard her other boiler and to break in the lower forward saloon.

At the time of the explosion, the libelant was sitting on the port side of the upper deck, where it was proper for him to sit, and where, under ordinary circumstances, he would have been safe. He was thrown upward by the explosion and fell upon the deck ten or twelve feet from where he was sitting at the time of the explosion. His right leg was broken at the neck of the trochanter, and his elbow and hand were bruised. He was taken to a hospital in Savannah for treatment, and for weeks suffered great pain from his injuries. As a result of the fracture he was crippled for life, his injured leg being shortened about an inch and a half.

The libelant was an Episcopal clergyman, and, at the time of his injuries, aged thirty-seven years, and was of sound bodily health.

At the time of the explosion, Wm. Moultrie, first engineer of the boat, was in charge of the engine. He was killed by the explosion. He went on duty at six o'clock that evening. Mark Davis was fireman, on duty at the same time.

John Sherman was second engineer, and was relieved by Moultrie at six o'clock. When Moultrie relieved him he told Sherman that when the latter came on watch again that night, he should keep a strict lookout for everything, and to be sure to keep his eyes on the pump and see that it continued to work.

At the time of the explosion, Moultrie, the engineer, was in

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his usual position in full view of the glass and water gauges. The explosion was preceded by a humming or whistling noise, and water and ashes came from under the port boiler, and were blown forward.

The testimony touching the character of Moultrie was conflicting. Some of the witnesses spoke of him as a sober, careful and competent engineer, and very faithful and attentive to his duties. One witness, however, stated that about two weeks before the explosion he saw him on the wharf at Savannah, while the boat was getting up steam, so drunk as to be unfit to run an engine on any steamer. The witness said he spoke to Mr. Benson, the agent of the boat, about the condition of Moultrie at that time, and Mr. Benson said the company intended to get rid of him as soon as possible.

The evidence tended to show that the boilers and machinery of the boat were in good order and repair just before the explosion. The boilers had been repaired and inspected in August preceding, and, a short time before the trip on which the explosion occurred, had been cleaned out and were apparently sound and good. The pump was a good one and had never been known to fail.

There was a glass water gauge and there were water cocks for ascertaining the quantity of water in the boilers. The evidence showed that it was necessary to try the water cocks as well as to examine the glass water gauge in order to ascertain the height of the water in the boilers; that it was not prudent to rely entirely on the glass water gauge, which was likely to choke up and deceive the engineer. There was some conflict in the evidence on the point whether it was customary on the boat to test the water by the water cocks.

After the explosion a piece of the bottom of the exploded boiler was found in the boat. It was hard and brittle and broke under the shears. Its tensile strength had been lost to the extent of five or six thousand pounds by being heated and chilled. It had been burned by fire. It was in evidence that it was the duty of an engineer to prevent the

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burning of his boilers, and that when they were allowed to burn there was a presumption of negligence.

The Reliance was allowed to carry eighty pounds of steam. But she not infrequently carried from eighty-two to eighty-three pounds, and it was often necessary for her to carry this amount to make up her time. Just before the explosion the steam gauge in the cabin indicated a steam pressure of seventy-two pounds.

The libelant was without fault and his injuries were received without any negligence or carelessness on his part.

Messrs. R. R. Richards and H. C. Cunningham, for libelant.

Messrs. R. E. Lester and T. P. Ravenel, for respondent.

WOODS, Circuit Judge. The carriers of passengers are not insurers of the safety and lives of those whom they carry. Angell on Carriers, sec. 536; 2 Greenleaf on Ev., sec. 222; *Christie v. Greggs*, 2 Camp., 79; *Israel v. Clark*, 4 Esp., 259; *Aston v. Heaven*, 2 Esp., 522; *Meier v. Penn. Railroad Co.*, 64 Penn. St., 225; *McPadden v. New York Central Railroad Co.*, 44 N. Y., 478; *Daniel v. Metropolitan R'y Co.*, L. Rep., 5 H. L., 45.

Nevertheless, a carrier of passengers is bound to exercise the utmost knowledge, skill and vigilance to carry his passengers in safety. *Curtis v. The Rochester & Syracuse Railroad Co.*, 18 N. Y., 534; *Steamboat New World v. King*, 16 How., 469; *Stokes v. Sultonstall*, 13 Pet., 181.

In the last case cited the supreme court says, "it is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods; for the goods the carrier is answerable at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent, that he or his agent, if he acts by an agent, shall provide competent skill, and that so far as human care and foresight can go he will transport them safely."

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The explosion of the boiler and the consequent injury to the libelant are of themselves *prima facie* evidence of negligence.

In *Christie v. Griggs*, 2 Camp., 79, Sir James Mansfield, chief justice, said: "I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. . . . When the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied."

This case is cited with approbation by the supreme court in *Stokes v. Sultonstall*, *supra*.

In *Railroad Company v. Pollard*, 22 Wall., 341, the case of *Stokes v. Sultonstall*, 13 Pet., 181, was approved, and it was declared that in a suit against a railroad company for an injury to a passenger, if it appeared that the passenger was in the exercise of that degree of care which might be reasonably expected from a person in his situation, and injury occur to him, this is *prima facie* evidence of the carrier's liability."

In the present case, where the injury was caused by the explosion of the boiler of the steamboat while the same was in charge of the servants of the boat, there can be no question that the explosion itself makes out a *prima facie* case of negligence, and unless this presumption is rebutted, the libelant ought to recover.

The question for decision upon the facts is, therefore, has the respondent rebutted this presumption?

The proof shows that the boilers of the Reliance and her machinery were in good order. The boilers had been recently repaired and had been inspected by one of the government inspectors at Savannah, and had been cleaned out a short time before. At the time of the explosion there was no defect apparent in the boat, her boilers or machinery.

The explosion must therefore have been caused either by some latent defect which the closest examination could not discover, or by the negligence of those in charge of her boilers and machinery, and it is incumbent on the respond-

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ent to show that the disaster was caused by the former and not by the latter.

There is no direct proof whatever that there was any defect in the boiler or running of the boat to which the explosion could be attributed. The respondent, however, seeks to draw the inference that there was such defect, from the proof tending to show the good character of the engineer for sobriety, skill and attention to his duties, and from the fact that just before the explosion he was at his post, apparently attending to his duties.

But there is evidence in the record tending to rebut this proof of the respondent. It is shown that the engineer was not always sober, and there is evidence tending to show that the glass gauge was relied on to ascertain the height of water in the boilers, and that the water gauge cocks were not used for that purpose. This, according to the evidence of the government inspector, would be negligence, because a glass gauge is likely to choke up and deceive the engineer.

But the fact which to my mind rebuts the inference to be drawn from the alleged good character of the engineer and his attention to his duties is found in the condition of that part of the boiler which was left on the boat after the explosion. The government inspector says in reference to this fragment of the boiler, "I examined it with Mr. Henderson. We had it cut, but did not cut the worst part of it, as we desired to keep it for further information. The piece we had cut was hard and brittle and it broke under the shears; its tensile strength had been taken away to the extent of about five or six thousand pounds by being heated and chilled; it had been burned by fire."

This witness adds, "It is an engineer's duty to prevent the burning of the boilers, and the presumption is that when they do burn, it is negligence." On this point Sherman, the second engineer, says: "I would consider it great carelessness to let your boiler burn; it could not happen without great carelessness."

The respondent claims that the piece of the boiler found on the deck might have been burned after the explosion by

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the fire left in the furnace. This is mere conjecture without any evidence to support it. And the results of the explosion, as disclosed by the evidence, render such a theory highly improbable.

This evidence makes it perfectly clear that the boilers of the boat were not in a sound condition at the time of that explosion; and that their unsafe condition was due to the carelessness of the engineers, or one of them. It may have been owing to the carelessness of Moultrie, the engineer on duty at the time of the explosion, or of the second engineer, Sherman, who admitted after the disaster that it was not his habit to try the water gauge cocks, and who, for this negligence, had had his license revoked.

It is also in evidence that the boat very frequently carried more pressure than she was allowed to.

With all this testimony touching the management of the boat by her engineers, and the condition of the boilers at the time of the explosion, we are asked to find that the explosion was caused by some hidden defect in the material out of which the boilers were constructed, and not to defects caused by carelessness and bad management. No hidden defect is shown to have existed. We are asked to infer it from the good characters of the engineers. The facts prove that the engineers were careless and negligent, and the result of that negligence is shown by the condition of the boilers at the time of the explosion. The natural and almost unavoidable inference is, that this explosion was the result of the bad treatment of the boilers by the engineers, and not the result of some concealed flaw.

In my judgment, the presumption of negligence arising from the fact of the explosion is not removed but is greatly strengthened by the evidence in the case, and the libellant must have a decree for the damages which he has sustained.

Upon the facts as disclosed by the evidence, I estimate his damage at \$5,000, and direct a decree in his favor against the boat for that sum and costs, both in this court and in the district court.

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AT CHAMBERS, FEBRUARY, 1881.

GEORGE H. TILLEY V. THE SAVANNAH, FLORIDA & WESTERN RAILWAY COMPANY, JAMES M. SMITH, CAMPBELL WALLACE AND SAMUEL BARNETT, RAILROAD COMMISSIONERS, AND ROBERT N. ELY, ATTORNEY GENERAL.

1. Under the legislation of Georgia the rights, privileges and franchises of the Savannah, Florida & Western Railway Company are subject to alteration or withdrawal at the will of the legislature.
2. The act of the legislature of Georgia entitled "An act to provide for the regulation of freight and passenger tariffs in this state," etc., passed October 14, 1879, does not revoke any of the privileges or immunities of said railway company in such manner as to work injustice to its corporators or creditors, and is therefore not in violation of paragraph 3, section 3, article 1 of the constitution of the state.
3. The power to regulate railroad freights and passenger tariffs being conferred by the constitution of Georgia upon the legislature, the question, what are just and reasonable rates, is a legislative and not a judicial one.
4. The legislature does not lose its right to modify or repeal the charter of a railroad company because the company had issued its bonds and secured them by a mortgage upon its property at a time when the state was a stockholder, and because the stock of the state had been voted in favor of the execution of the bonds and mortgage.
5. The delegation to railroad commissioners of the duty of making a schedule of reasonable and just rates of freight and passenger tariffs, by which the railroad companies were to be governed, is not in violation of paragraph 1, section 2, article 4 of the constitution of Georgia.
6. An act of the legislature of Georgia provided for the appointment of railroad commissioners, and required them to make schedules of reasonable and just rates of freight and passenger tariffs for the several railroad companies of the state respectively, and forbid the railroad companies under heavy penalties to exceed the rates so prescribed, and declared that the schedule established by the commissioners should be sufficient evidence that the rates therein fixed were just and reasonable. *Held*, that the act, even though the rates fixed by the commissioners were unjust and unreasonable, does not violate that provision of the constitution of Georgia which declares that "private property shall not be taken or damaged for public

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use without just and adequate compensation being first paid," nor of that provision which declares that "protection to persons and property is the paramount duty of the government, and shall be impartial and complete," nor of that provision which declares that "no person shall be deprived of life, liberty or property, except by due process of law," nor of that provision which declares that "laws of a general nature shall have a uniform operation throughout the state," nor of that provision which declares that "the right of trial by jury shall be inviolate."

The case was heard at chambers on a motion for injunction *pendente lite*.

The constitution of the state of Georgia, paragraph 22 of section 7, article 3, reads as follows:

"The general assembly shall have power to make all laws and ordinances consistent with this constitution, and not repugnant to the constitution of the United States, which they shall deem necessary and proper for the welfare of the state."

Paragraph 1, section 2 of article 4 declares that:

"The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the general assembly, whose duty it shall be to pass laws from time to time to regulate freight and passenger tariffs; to prohibit unjust discriminations on the various railroads of the state, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

Paragraph 2 declares that:

"The exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as property of individuals, and the exercise of the police power of the state shall never be abridged nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the state."

Paragraph 1, section 5, article 2, declares:

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"The people of this state have the inherent, sole and exclusive right of regulating their internal government and the police thereof, and of altering and abolishing their constitution whenever it may be necessary to their safety and happiness."

Paragraph 1, section 3, article 1, declares:

. . . "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

Paragraph 3, section 1, article 1, declares:

"No person shall be deprived of life, liberty or property except by due process of law."

Paragraph 2, article 1, section 1, declares:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete."

Paragraph 1, section 4, article 1, declares:

"Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be revised in any particular case by special legislation, except with the free consent in writing of all persons to be affected thereby."

Paragraph 23, section 1, article 1, declares:

"The legislative, judicial and executive power shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of others except as herein provided."

Paragraph 3, section 3, article 1, declares:

"No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to corporations or creditors of the incorporation."

These provisions of the constitution being in force, the legislature, on October 14, 1879, passed an act to carry into effect paragraph 1, section 2 of article 4 above quoted.

The act provides (section 3) as follows:

"That . . . if any railroad corporation organized or

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doing business in this state under any act of incorporation or general law of this state now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other state, and doing business in this state, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

The act further provides for the appointment of three railroad commissioners, whose duty it shall be to make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in the state on the railroads thereof.

Section 6 of the act declares as follows:

"That the said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such railroad corporations wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedule."

Section 9 provides:

"That if any railroad company doing business in this state,

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by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than \$1,000, nor more than \$5,000, to be fixed by the presiding judge. An action for the recovery of such penalty shall lie in any county in the state where such violation has occurred, or wrong has been perpetrated, and shall be in the name of the state of Georgia. The commissioners shall institute such action through the attorney general or solicitor general, whose fees shall be the same as now provided by law."

By authority of this act James M. Smith, Campbell Wallace and Samuel Barnett were appointed railroad commissioners, and were qualified and entered upon the discharge of their duties.

The commissioners, as required by law, prepared and promulgated a standard schedule of just and reasonable rates of charges for the transportation of passengers and freights, and cars, and required it, with such modifications as might thereafter be set forth, to be observed by such of the railroad corporations doing business in the state, and that copies of the schedule should be posted by the railroad companies at all their stations, and that the same should go into full effect and operation on May 1, 1880.

Thereupon the complainant in this case, George H. Tilley, who averred himself to be an alien and a stockholder in the Savannah, Florida & Western Railroad Company, a railroad corporation of the state of Georgia, filed his bill, to which he made the said railroad company, James M. Smith, Campbell Wallace and Samuel Barnett, railroad commissioners, and Robert N. Ely, attorney general of Georgia, parties defendants.

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The bill further averred that:

"The Atlantic & Gulf Railroad Company, the corporation which owned the railroad so purchased, was composed of 'the Atlantic & Gulf Railroad Company,' incorporated under the act of the state of Georgia, approved February 27, 1856, and the original 'Savannah & Albany Railroad Company,' chartered by act of the general assembly of Georgia, approved December 25, 1847, the name of which was changed to the 'Savannah, Albany & Gulf Railroad Company' by an act approved February 20, 1854. Acts of 1865-6, p. 158; Acts of 1853-4, p. 454. That these two companies were consolidated by authority of an act of the general assembly of the state of Georgia, approved April 18, 1863, entitled 'An act to authorize the consolidation of the stock of the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, and for other purposes.' By the third section of said act of consolidation, it was enacted, 'That the several immunities, franchises and privileges granted to the said Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, shall continue in force, except so far as they may be inconsistent with their act of consolidation.'"

The bill claimed that the two companies aforesaid, which were consolidated, and out of which the Atlantic & Gulf Railroad Company was formed, were granted by their charters the right to charge certain rates of freight and passenger fares specified therein, and that the right to charge the same freights and fares had been conferred upon the Savannah, Florida & Western Railroad Company by the act of February 29, 1876, aforesaid.

The Savannah, Florida & Western Railroad Company had adopted a schedule of freights and passenger fares less than the maximum rates fixed by the charter of the Atlantic & Gulf Railroad Company, but that the rates so adopted were greater than those fixed by the schedule of the said railroad commission.

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The bill charged that if the rates established by the railroad commissioners were made obligatory upon the Savannah, Florida & Western Railroad Company, it would not only be unable to establish a sinking fund to pay off its first mortgage bonds, but would be unable to declare dividends of any amount whatever to its stockholders, and the company would be driven into ruin and bankruptcy.

The bill further alleged that complainant had hoped that the said Savannah, Florida & Western Railroad Company would adhere to the schedule of freights and fares which it had adopted as aforesaid, but that he had been informed, and charged that it intended to abandon said schedule and adopt the one promulgated by said railroad commission, which it admitted would not enable it to earn a sufficient income to pay its expenses and the interest on its bonded debt, but that on the contrary its receipts would not enable it to pay the interest on its bonds by at least \$40,000 per annum, and that such deficit would continue from year to year, and the stockholders of said company would receive no dividend whatever, but that the value of the stock of said company would be gradually destroyed by said annual deficit.

The bill averred that said act of October 14, 1879, under authority of which said railroad commissioners assumed to act, was in violation of the several provisions of the constitution of Georgia, above quoted, and that it excluded the defendant railroad company from its right of trial by jury guarantied by the constitution of the state; that it violated that clause of the constitution of the state, paragraph 9, section 1, article 1, which ordains that excessive fines shall not be imposed, nor cruel nor unusual punishments inflicted; that said act violated that part of the 14th amendment to the constitution of the United States, which declares that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of the laws," and section 10, article 1, which forbids a state to pass any law impairing the obligation of contracts.

The bill prayed that the Savannah, Florida & Western

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Railroad Company might be enjoined from doing any act which would be an acceptance of the said statute of October 14, 1879, as an amendment to its charter, or from carrying out the provisions of said act, or from operating its road for such rates of fare and freight as should be inadequate to yield a revenue sufficient to pay running expenses and maintain its track and equipment, and pay interest on its bonded debt and reasonable dividends to its stockholders, and provide a reasonable sinking fund for the payment of the principal of its bonded debt, and that said commissioners might be enjoined from prescribing rates of fare and freight over said company's railroad, or in any manner enforcing the provisions of the said act of October 14, 1879, and that the attorney general might be restrained from instituting any suit of any kind against said railroad company for the purpose of enforcing the provisions of said act, and for general relief.

Upon the filing of this bill a restraining order was allowed enjoining the defendants as prayed for.

Subsequently on September 6, 1880, the defendant railroad company answered the bill, and on September 18th, the railroad commissioners filed a demurrer thereto.

On December 6, 1880, the complainant filed an amendment to his bill, in which he averred that estimating the stock of the defendant company at \$2,000,000, and taking into account the mortgage lien subject to which it was bought, which amounted to \$2,710,000, the entire cost of the railroad and other property was only \$14,000 per mile; that the gross receipts of the Atlantic & Gulf Railroad Company for the last eight years, under a schedule substantially higher than that adopted by the Savannah, Florida & Western, were \$983,792; that the average interest charges and expenses of the latter company amounted to \$867,242, leaving a surplus of only \$116,550 applicable to dividends and sinking fund, and that allowing a dividend of seven per cent. on the stock, the net receipts would fall short \$23,550 per annum.

The amendment further alleged that the receipts of the

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defendant railroad company, under the schedule promulgated by the railroad commissioners, would fail to pay the running expenses, the annual interest on prior liens, subject to which the railroad was sold, by nearly \$50,000 per annum, and the said amendment charged that the schedule promulgated by said commissioners was not reasonable or just.

On December 22, 23 and 24, 1880, the case was heard upon a motion for an injunction *pendente lite* in accordance with the prayer of the bill. Upon this motion the affidavits of John Screven, lately one of the receivers of the Atlantic & Gulf Railroad Company, of W. S. Chisholm, vice-president, H. S. Haines, general manager, and W. P. Hardee, treasurer of the Savannah, Florida & Western Railroad Company, and of C. H. Phinzy, president of the Georgia Railroad Company, were read for the complainant, and the affidavit of the railroad commissioners was read in their own behalf.

Mr. Robert Falligant, for the complainant.

Messrs. Clifford Anderson, Attorney General of Georgia, *Robert Toombs* and *P. L. Mynatt*, for the railroad commissioners.

Mr. W. S. Chisholm, for the Savannah, Florida & Western Railroad Company.

WOODS, Circuit Justice. The question for solution is whether the case made by this bill and amendment and the affidavits in support of it entitles the complainant to the writ of injunction as prayed for in his bill.

The first inquiry that arises is, what are the rights of the Savannah, Florida & Western Railroad Company under the law of its organization? On behalf of the complainant it is averred that the railroad company has the right, within limits prescribed by the charter of the Atlantic & Gulf Railroad Company, to fix its own schedule of freight and passenger fares, and that this right is not subject to legislative control.

It is settled that railroad companies are subject to legislative control as to their rates of fare and freight unless pro-

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ted by their charters. *Munn v. Illinois*, 94 U. S., 113; *Chicago, etc., Railroad Company v. Iowa*, 94 U. S., 155.

When the charter of a railroad company allows it to charge maximum rates of fares and freight, but the right is reserved to the legislature to repeal or amend the charter, it may change the rates prescribed by the charter by establishing a maximum limit beyond which they shall not go. *Peik v. Chicago, etc., Railroad Company*, 94 U. S., 164.

By the act of the legislature of Georgia of February 29, 1876, entitled an act to enable the purchasers of railroads to form corporations and to exercise corporate powers and privileges, under which the Savannah, Florida & Western Railroad Company was organized, it was clothed with all the rights, privileges and immunities of the Atlantic & Gulf Railroad Company. It is necessary, therefore, to inquire what were the charter rights of the latter company. It was organized by the consolidation of the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by authority of an act of the legislature of Georgia, approved April 18, 1863. When this act was passed, sections 1651 and 1682 of the code of 1863, which took effect January 1, 1863, were in force. The first of these sections declared: "Persons are either natural or artificial. The latter are the creatures of law, and, except so far as the law forbids, are subject to be changed, modified or destroyed at the will of their creator; they are called corporations." The second declared: "In all cases of private charters hereafter granted the state reserves the right to withdraw the franchise unless such right is expressly negatived in the charter."

From these sections of the code it is apparent that the rights, privileges and franchises of the Atlantic & Gulf Railroad Company were subject to alteration, amendment or withdrawal at the will of the legislature.

This point has been expressly decided by the supreme court of the United States in the case of *Railroad Company v. Georgia*, 98 U. S., 359.

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In that case it was held that by the consolidation under the act of April 18, 1863, of the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, said companies were dissolved and a new corporation (to wit, the Atlantic & Gulf Railroad Company) was created, and that this new company became subject to the provisions of the code of Georgia above recited.

And it has been expressly decided by the supreme court of Georgia that all charters granted by the state since the adoption of the code of 1863 are subject to the provisions of section 1682 above quoted. *West End, etc., Company v. Atlanta, etc., Company*, 49 Ga., 151.

It must, therefore, be considered as conclusively settled that the right of the Atlantic & Gulf Railroad Company to establish its own schedule of freight and fares within certain limits was subject to legislative modification and control. The Savannah, Florida & Western Railroad Company having succeeded to the rights and franchises of the Atlantic & Gulf Company is subject to the same revisory power.

But so far as the Savannah, Florida & Western Railroad Company is concerned, the right of legislative control over its franchise has been placed beyond all dispute, if any remained, by section 8 of the act under which the company was organized. That section declares: "That nothing in this act shall operate to vest in any purchaser of any railroad and its franchises any exemption for taxation existing or claiming to exist in the corporation which shall have been the owner of said railroad and its franchises, or to limit the powers of the legislature to alter, modify or withdraw the charter and franchises herein provided."

Complainant says, however, that if the power of the legislature, under the charter of the company to modify or withdraw its franchises, be conceded, yet this power is now restrained by that paragraph in the bill of rights of the constitution of 1877 which declares, "no grant of special privileges or immunities shall be revoked, except in such manner

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as to work no injustice to corporators or creditors of the incorporation." Par. 3, sec. 3, art. 1, Constitution of 1877.

This presents the question whether the act of October 14, 1879, under which the railroad commissioners assume to act, revokes any of the privileges and immunities of the defendant railroad company in such manner as to work injustice to the corporators or creditors of the corporation.

That act forbids the railroad corporations of the state, including the defendant railroad company, from charging unfair and unreasonable rates of freight and fare, or making unjust discriminations for the transportation of passengers and freights, and provides for the appointment of a commission to prescribe reasonable and just rates of freight and passenger tariffs to be observed by all the companies doing business in this state on the railroads thereof.

There is certainly nothing in this act hostile to the paragraph in the bill of rights just referred to. The franchise of the defendant company is to fix its own rates of freights and fares within certain limits, subject to the revisory powers of the legislature. It has never had absolute right to establish its own schedule of freights and fares. The right to fix its rates of charges has always been subordinate to legislative control. How, then, can an attempt on the part of the legislature to regulate the charges of the defendant company be considered as an attempt to revoke the special privileges and immunities of the company?

But this clause in the bill of rights must be read in connection with paragraph 1 of section 2 of article 4 of the constitution, which confers upon the legislature the power and authority of regulating railroad freights and tariffs, and makes it the duty of the legislature to prohibit railroads from charging other than just and reasonable rates.

The legislature in the act of October 14, 1879 (*supra*), has merely forbidden the railroad companies from exacting more than fair and reasonable rates for the transportation of freights and passengers, and has attempted, through a commission, to prescribe what are just and reasonable rates.

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Upon its face there can be no constitutional objection to this legislation excepting on the assumption that it is one of the special privileges and immunities of the railroad companies to charge unjust and unreasonable rates of freight and fare.

But it is urged by complainant that the rates prescribed by the commissioners under authority of the legislature are not just and reasonable, but are oppressive and destructive of the value of the property of the railroad companies. Assuming for the present that the legislature had the constitutional right to delegate the power of prescribing rates to a commission, and that the schedule established by it is the schedule of the legislature, the question is then presented, Where does the power reside to declare what are just and reasonable rates? Is it a judicial or legislative question? It seems to me that section 2 of article 4 of the constitution by its very terms confers that power on the legislature. It declares that "the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred on the general assembly, whose duty it shall be to pass laws to regulate freight and passenger tariffs, to prohibit unjust discrimination, and to prohibit said roads from charging other than just and reasonable rates." How a delegation of power to declare what is just and reasonable could be more plain and explicit, it is difficult to see. It is not conferred on the courts, and the railroad companies have no part or lot in the decision of the question, but the constitution declares "it is hereby conferred on the general assembly." But even when there is no such constitutional provision as exists in this state, it has been held that "where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Peik v. Chicago, etc., Railway Company*, 94 U. S., 164; *Munn v. Illinois*, 94 U. S., 113.

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Looking, therefore, at the several clauses of the constitution which bear upon the subject, it cannot be said by the railroad companies that an attempt by the legislature to prescribe reasonable rates for the transportation of freights and fares is a revocation of any of their special privileges or immunities.

In my judgment the clause of the constitution now under consideration was not meant to limit the power of the legislature over the subject of freights and fares, which is fully treated in section 11, art. 14, but was intended to protect the incorporators and creditors of the incorporation from the results which at common law followed the revocation of the charter of an incorporated company, which were, that its realty reverted to the grantors and its personalty escheated to the state.

The complainant alleges that when the bonds and the mortgage to secure the same, subject to which the defendant company bought the railroad and other property of the Atlantic & Gulf Company, were executed, the state of Georgia was the owner of ten thousand shares of the stock of the latter company, and this stock voted in favor of the issue of the bonds and the execution of the mortgage; that the bonds bore seven per cent. interest, payable annually, and are to fall due July 1, 1877; that the property was conveyed by the mortgage or trust deed to a trustee with the power, upon default of the payment of interest, to take possession and operate the road, and pay first, expenses; second, prior liens; third, interest and principal of the bonds, and fourth, the residue to the corporation; but until default the company was to manage the property instead of the trustees.

And he claims that the reserved right of modification or repeal does not apply when such modification will impair a contract like this made by the state herself.

To this there are two answers. In the first place the state made no contract when the Atlantic & Gulf Railroad Company issued its bonds and executed its mortgage to secure this. The bonds and mortgage were the contracts of the company and not of its stockholders.

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Secondly, the purchasers of the bonds took them subject to the power of the state to regulate the rates of freight and fares. The state never either by express or implied contract agreed that this power should not be exercised. The purchasers of bonds took the risk of the ability of the company to do business enough, under the provisions and restrictions of its charter and subject to the right of the legislative revision, to pay the principal and interest on the bonds.

The same answer applies to the claim that the state was bound by the contracts made by the railroad company and the receivers with the lumbermen. Neither the railroad company nor the receivers could deprive the state of the right reserved in the charter of the railroad company to control its charges by making contracts for freight in advance. The fact that the state is a stockholder in the railroad company does not modify the charter or confer on the railroad company any new rights.

The complainant next insists that paragraph 1, section 2 of article 4 of the constitution of Georgia, requires the general assembly itself to regulate railroad freights and passenger tariffs and prohibit unjust discriminations on the railroads of the state and prohibit them from charging other than just and reasonable rates, and that the delegation of this duty to the railroad commissioners is not warranted by the constitution.

The argument is that the act of October 14, 1879, delegates to the railroad commission legislative power which by the constitution is conferred exclusively upon the legislature.

The paragraph of the constitution which authorizes and requires the action of the general assembly on this subject does not in terms require that body to prescribe the rates of freights and fares. It is required "to pass laws to regulate freight and passenger tariffs." It has in performance of this duty declared that the rates charged by the railroad companies should be just and reasonable, and appointed a commission to fix the maximum of just and reasonable rates,

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beyond which the railroad companies shall not go. This action seems to fall strictly within the terms of the authority on which it is based.

If, however, the power conferred on the commissioners can only be exercised under the constitution by the legislature, the act conferring such powers must be declared void.

A somewhat careful consideration of this point entirely satisfies me that the duties imposed by the act upon the commissioners are not legislative, and are not necessarily to be performed by the legislature.

If the act had declared that no railroad company should charge other than just and reasonable rates, and that the board of directors of every railroad company in the state should prescribe maximum charges which should be posted at each station, and beyond which the ticket and freight agents of the companies should not go, it could not reasonably be claimed that the directors were clothed with legislative power. Is the case altered when the general assembly, instead of making the board of directors the body to fix maximum rates, appoints an independent, and, it is fair to presume, a more impartial body for that purpose? The nature of the duty discharged is not changed by a change in the person or persons on whom the duty is imposed.

It is a familiar rule of constitutional construction that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end. *McCullough v. Maryland*, 4 Wheat., 316.

The general assembly of Georgia is expressly required by paragraph 1, section 2, article 4, to pass laws from time to time to regulate freight and passenger tariffs, and to prohibit unjust discrimination and the charging of unjust and unreasonable rates by the railroad companies of the state. The fixing of just and reasonable maximum rates for all the railroads in the state is clearly a duty which cannot be performed by the legislature, unless it remain in perpetual session and devote a large portion of its time to its performance. The question, what are just and reasonable rates? is one

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which presents different phases from month to month, upon every road in the state, and in reference to all the innumerable articles and products that are the subjects of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is largely given to the consideration of the subject.

It is obvious that to require the duty of prescribing rates for the railroads of the state to be performed by the general assembly, consisting of a senate with forty-four members, and a house of representatives with one hundred and seventy-five, and which meets in regular session only once in two years, and then only for a period of forty days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice, in some cases to the railroad companies and in others to the people of the state. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself is to defeat the purpose of that clause of the constitution under consideration.

The view taken by complainant would preclude the legislature from the use of the necessary means and agencies to accomplish what it is required by the constitution to do. The constitution of the United States gives to congress the power to levy and collect taxes, but this does not require congress itself to assess the property of the tax-payer and collect the tax. The constitution of Georgia clothes the general assembly with the power of taxation over the whole state, and requires taxes to be assessed upon all property *ad valorem*. But this does not require the legislature to investigate through its committees or otherwise, and declare by an act the value of every piece of property in the state subject to taxation.

In many of the states it has been held that notwithstanding the fact that a state constitution confers legislative power exclusively on the legislature, yet that body may delegate legislative or *quasi* legislative power on subordinate agencies.

A familiar instance of the use of agencies by the legisla-

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ture for the exercise of the power vested in it by the constitution is found in the creation of municipal corporations and of the powers of legislation which are commonly bestowed upon them. The bestowal of such powers is not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and England, which has always recognized the propriety of vesting in municipal corporations certain powers of local regulation in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. Cooley on Constitutional Limitations, 143; *City of Patterson v. Society, etc.*, 24 N. J. (4 Zab.), 855; *Cheany v. Hooser*, 9 B. Monroe, 330; *Berlin v. Gorham*, 34 N. H., 266.

Even so grave a matter as taxation has always in the state of Georgia, even without special constitutional provision, been delegated to cities, towns and county organizations. *Brunswick v. Finney*, 54 Ga., 317; *Powers v. Inferior Court of Dougherty County*, 23 Ga., 65.

The rule applicable to the delegation of power by a legislature is laid down with great clearness in the case of the *Cincinnati, etc., Railroad Company v. Clinton County*, 1 Ohio St., 77.

The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The constitution of the state of Illinois, article 4, section 1, declares that "the legislative power shall be vested in a general assembly, which shall consist of a senate and a house of representatives," etc. Article 13, section 7, of the same constitution declared that "the general assembly shall pass laws for the inspection of grain for the protection of producers, shippers and receivers of grain."

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The legislature of Illinois, with these constitutional provisions in force, passed an act to establish a board of railroad and warehouse commissioners. This board was empowered to fix the rate of charges for the inspection of grain and the manner in which the same should be collected, and to fix the amount of compensation to be paid the chief inspector and other officers, etc.

It was objected that this was an unwarrantable delegation of legislative power. But the supreme court of that state held that the right to pass inspection laws belonged to the police powers of the government, and the legislature had the authority to arrange the distribution of said powers as the public exigencies might require, apportioning them to local jurisdictions as the law-making power deemed appropriate, and committing the exercise of the residue to officers appointed as it might see fit to order, and that it was important for the general assembly to delegate to a commission the power to control the subject of the inspection of grain, and to prescribe what fees should be charged for the inspection of grain, and regulate them from time to time as circumstances might require.

The court says: "The principles repeatedly recognized by this and other courts of last resort, that the general assembly may authorize others to do things which it might properly, yet cannot understandingly or advantageously do itself, seems to apply with peculiar force to the fixing of the amount of inspection fees so as to adjust them properly with reference to the expenses of inspection." *The People v. Harper*, 91 Ill., 357. See, also, *Police Commissioners v. Louisville*, 3 Bush, 597; *People v. Shepard*, 36 N. Y., 285; *People v. Pinckney*, 32 N. Y., 377; *Bush v. Shipman*, 4 Scam., 186; *Trustees of Schools v. Tutman*, 13 Ill., 27; *County of Richland v. County of Lawrence*, 12 Ill., 1; *Respublica v. Duquet*, 2 Yeates (Pa.), 493.

By the authority cited, it is held that even if the power conferred on municipal corporations or special commissions be legislative or *quasi* legislative, still it is within the discretion of the legislature to confer it.

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My conclusion upon this point is, therefore, that the act of October 19, 1879, is not unconstitutional by reason of a delegation to the railroad commissioners of legislative power.

It is claimed that the law is unconstitutional because by declaring that the schedule of rates established by the commissioners shall be held and taken in all the courts as sufficient evidence that the rates therein fixed are just and reasonable, it deprives the railroad companies of their constitutional right to a trial by jury.

In this provision the legislature has exercised the power exercised by all the legislatures, both federal and state, of prescribing the effect of evidence, and it has done nothing more. Even in criminal cases congress has declared that certain facts proven shall be evidence of guilt. For instance, in section 3082 of the United States Revised Statutes, it is provided that whenever on an indictment for smuggling the defendant is shown to be in possession of smuggled goods, "such possession shall be deemed evidence sufficient to authorize a conviction unless the defendant shall explain the possession to the satisfaction of the jury." The statute books are full of such acts, but it has never been considered that this impairs the right of trial by jury.

But even if this provision of the act under consideration were unconstitutional, it would not render inoperative the other sections of the statute, from which this provision can be easily removed, and yet leave the main object and purpose of the law unimpaired. *Packet Company v. Keokuk*, 95 U. S., 80.

It is next insisted that the railroad commission act is unconstitutional because it violates that declaration of the bill of rights, paragraph 1, section 3, which declares that "private property shall not be taken or damaged for public uses without just and adequate compensation being first paid."

This clause is a regulation of the exercise of the state's right of eminent domain.

An act attempting to fix just and reasonable rates of freight and fares upon the railroads of the state can hardly

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be considered as taking or damaging the property of the railroad for public use. The object of the law is to regulate the charges which the corporation may make in the use of its own property for its own purposes. It does not take it or damage it for public use. The act was passed because its passage was expressly enjoined by the constitution. It does not become obnoxious to the constitutional provision under consideration and become a taking or damaging of private property for public use, because all the rates fixed are not just and reasonable, or because they are thought to be so by the railroad companies.

Again, the act under consideration is alleged to be unconstitutional because obnoxious to paragraph 11, section 1, article 1, of the constitution, which declares, "Protection to person and property is the paramount duty of the government and shall be impartial and complete," and of paragraph 3, section 1, article 1, which declares that, "No person shall be deprived of life, liberty or property, without due process of law."

When it is remembered that these paragraphs are referred to a law, the only purpose of which is the performance by the legislature of its constitutional duty to prohibit unjust discriminations and unjust and unreasonable charges by the railroads of the state, it is difficult to see how they are pertinent to the matter.

In *Munn v. Illinois*, 94 U. S., 113, it was held that the limitation by legislative enactment of charge for services rendered in public employment, or for the use of property in which the public has an interest, does not deprive the owner of his property without due process of law. Neither can it be said that it is a denial of impartial and complete protection to property.

It is next insisted that the law is one of "a general nature," but that it does not have a uniform operation throughout the state as required by paragraph 1, section 4, article 1, of the constitution of the state.

The act assailed is an act affecting railroad companies

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only, and it is designed to have uniform operation on them throughout the state. Its purpose is to require all such companies in the state to charge just and reasonable rates, and to prohibit unjust discrimination by them. To give the law a uniform operation it is not necessary that it should prescribe the same rates for all the railroad companies. It might as well be claimed that the legislature, in framing an act to regulate toll-bridges, must prescribe the same rate of toll for every bridge in the state, and that otherwise the act would not have a uniform operation.

The ingenuity of counsel has brought into the case these various paragraphs of the constitution in the hope that the railroad commissioners' act might be impaled on some one of them.

I have considered them all. Most of them have but a very remote application to the law — some of them have already been considered by the supreme court of the United States in *Munn v. Illinois* and *Peik v. Chicago*, 94 U. S., *supra*, and decided to have no control over similar legislation.

The act of the legislature, if constitutional, may be considered unwise or even oppressive, but even if it is, the remedy is not with the courts but with the legislature. If the general assembly in its passage were acting within the scope of its constitutional power, no matter how crude and unjust the law may be, the court cannot apply the remedy.

There is nothing in the act complained of which indicates a disposition on the part of the legislature to oppress the railroad companies. It appears to be rather an attempt in good faith to discharge a duty imperatively demanded of the legislature by the state constitution.

The complaint is not so much against the legislature as against the railroad commissioners. Their administration of the law is charged to be oppressive and unjust to the railroad company in which the complainant is a stockholder. It is alleged that the schedule of rates fixed by the commissioners for the railroad is, if adhered to, destructive to the railroad property and ruinous to its creditors and stockholders.

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The evidence submitted upon this point by the complainant, consisting of the affidavits of Mr. Haines, the general manager of the defendant railroad company, and others, on the one side, and the affidavit and reports and circulars of the railroad commissioners on the other, is very conflicting and irreconcilable. It is not so much a conflict as to the facts, as it is in matters of judgment and inferences from facts.

One thing is made clear to my mind by the evidence. It is that there has been an honest and painstaking effort on the part of the commissioners to perform their duty under the law fairly and justly. The difference between the railroad commissioners and the officers of the Savannah, Florida & Western Railroad Company is an honest difference of judgment.

The company puts the present investment in its road at \$4,710,000, and claims that a profit of ten per cent. per annum would be just and reasonable. The commissioners placed the value of the investment at \$4,000,000, and a just and reasonable profit thereon at eight per cent.

The railroad company estimates its annual expenditure for maintaining and operating the road at \$700,000. The commissioners are of opinion that \$550,000 would suffice with good management and proper economy. The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The affidavit of the railroad commissioners states that the average of rates charged by the Savannah, Florida & Western Railroad Company exceeded the average of rates charged by the Air-Line road, the Macon & Brunswick and the Brunswick & Albany—the three weakest roads in the state—by sixty per cent., and the rates charged by all other railroads in this state over seventy-five miles long by more than seventy per cent. The railroad commissioners assert that their schedule was framed to pro-

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duce eight per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right — the railroad company's officers or the railroad commission, in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation.

If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain, for the law makes it the duty of the commissioners "from time to time and as often as circumstances may require to change and revise said schedules."

This duty the commissioners stand ready to perform as they testify by their affidavit on file in this case. In short, they constitute a permanent tribunal where the complaints of the railroad companies of any action of the commissioners can be made and heard, and any wrong suffered thereby righted.

In their affidavit on file the commissioners say that they "accompanied their action by circulars indicating their readiness to review their action upon the presentation of sufficient data. The commission may have erred in its judgment; there was room for honest error; there was a difference of views in the commission itself as to the proper percentage to be added on the standard tariff rates. But there was no intention to wrong any interest nor to adhere to any error when shown to be such. . . . The circulars modifying rates on the showing of the railroads illustrates the desire of the commission to conform by closer and yet closer approximation to improved information."

The railroad company, after testing the results of the schedule of rates fixed by the commissioners, and finding it

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to be unjust and unreasonable, can apply to the commissioners for redress. If redress is denied them there, they can apply to the legislature for relief. Believing the law under which the commissioners are appointed to be within the constitutional power of the legislature, the redress must come either from the commissioners or the general assembly; it is not in the power of this court to give relief. As remarked by Mr. Justice Swayne in *Gilman v. Philadelphia*, 3 Wall., 713: "Many abuses may arise in the legislation of the states which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws, and from that tribunal there is no appeal. If a state exercise unwisely the power here in question, the evil consequences will fall chiefly on her own citizens. They have more at stake than the citizens of any other state."

It has been the policy of Georgia, at least since January 1, 1863, to grant no charter which should not be subject to revision or repeal by the general assembly. Whether wise or unwise, this policy has been embodied in the constitution of 1877. It was clearly the purpose of the people, in the adoption of that revision of the organic law, to keep the charges of the railroad companies of the state within legislative control. They were not satisfied with the rules of the common law on this subject. The act of October 14, 1879, is but the practical expression of the will of the people of the state as embodied in their organic law. It is the exercise of a right which they have been careful to reserve, and subject to which the defendant company was allowed to exist as a corporation.

My conclusion is, that the act of the legislature of Georgia, approved October 14, 1879, entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this state," etc., is not in violation of either the constitution of the United States or of the state of Georgia; that under the constitution of Georgia power and authority is

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conferred on the legislature to pass laws to regulate freight and passenger tariffs on railroads, and require reasonable and just rates, and it is its duty to pass such laws, that it may prescribe such rates, either directly or through the intervention of a commission, and that the question whether the rates prescribed by the legislature, either directly or indirectly, are just and reasonable, is a question which, under the constitution, the legislature may determine for itself.

It results from these conclusions that the motion for injunction *pendente lite* must be denied and the restraining order heretofore allowed must be dissolved, and it will be so ordered.

NOVEMBER TERM, 1881.

UNITED STATES v. LONG.

No penalty is prescribed by section 5467 of the Revised Statutes, for the offense of embezzling a letter with valuable contents, by a person in the postal service of the United States.

Indictment for embezzling letter with valuable contents by a person in the postal service. Heard on motion to quash.

Mr. S. A. Darnell, United States Attorney, for the United States.

Mr. J. Lyons, for the defendant.

PARDEE, Circuit Judge. In the revision of the laws to make up what are now known as the Revised Statutes, an error has been undoubtedly made in regard to the crime of embezzling letters by persons employed in the postal service. Section 5467, Rev. St.

Section 279 of the act approved June 8, 1872 — which act was a revision,— has been transcribed *verbatim* until the lat-

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ter and concluding part of the section is reached. The words "every such person shall, on conviction thereof, for every such offense," have been omitted, and as the section now reads, no penalty is prescribed for any offense under that section, save for stealing the valuable contents of a letter by an employee in the postal service.

By no grammatical construction, nor by any reasonable intendment, can the section be made to cover the offense of embezzling a letter with valuable contents, such as is charged in the indictment now under consideration. I have no doubt in the matter; but if the question were doubtful, I should feel constrained to give the doubt in favor of the prisoner.

An entry will be made sustaining the motion to quash.

MAY TERM, 1882.

LANNING V. LOCKETT.

1. The constitution of Georgia provides: "the court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation." *Held*, that in a suit on a promissory note, a plea denying the title of the plaintiff to the note is such issuable defense, although, if true, it may also show that the court is without jurisdiction.
2. In the courts of the United States, such issuable plea must be tried by a jury.
(Before PARDEE and ERSKINE, JJ.)

ACTION AT LAW. Heard on defendant's motion for new trial.
Messrs. Willis A. Hawkins, R. F. Lyon and T. B. Gresham, for the motion.

Messrs. A. O. Bacon and J. C. Rutherford, contra.

PARDEE, Circuit Judge. The plaintiff in this case, a citizen of the state of New York, brought this action against the defendant, a resident citizen of this division of the southern

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district of Georgia, alleging herself to be the holder and owner of a certain promissory note executed by the defendant in 1879, to the order of the Macon Bank & Trust Company, payable December 1, 1879, with interest after maturity, which note, being negotiable by the law merchant, the said Bank & Trust Company, for a valuable consideration, negotiated and transferred, and by written indorsement assigned, to plaintiff, whereby defendant became bound and promised to pay plaintiff the amount thereof, etc., concluding with the usual allegations and prayer in such cases. The defendant appeared and filed a plea to the jurisdiction, on the ground that the Macon Bank & Trust Company was a citizen of this division of the district, and its assignee could not sue in the United States courts. To this a demurrer was filed, which on hearing was sustained by the court, the note sued on having been executed since the act of 1875. The defendant then filed what he called a plea and answer, in substance as follows:

“And for plea and answer makes it appear to the court that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, and the said plaintiff has no substantial interest in the result of said suit on said promissory note sued on; but that the name of said plaintiff is used by the Macon Bank & Trust Company, a corporation residing in the said southern district, for the purpose of creating a suit cognizable in said circuit court; all of which defendant is ready to verify, and puts himself on the country.”

Afterwards defendant filed an amendment to the foregoing, setting forth more fully the following: That the plaintiff is not the owner of said note, neither now, before said suit was commenced, since that time, at that time, nor ever was, either in fact or in law; that the Macon Bank & Trust Company is now, and was at and before the commencement of the suit, the exclusive owner of said note; that the assignment of said note to said plaintiff was colorable and fraudulent, solely to give this court jurisdiction;

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that the plaintiff has no interest whatever in said note, or the money alleged to be due thereon, but is prosecuting said suit solely for the exclusive benefit of said Macon Bank & Trust Company. The said amendment concludes by alleging that the court has no jurisdiction and going to the country. Both the original and amendment, though pleaded by counsel, are verified by the defendant in person. To these pleas or defenses, plaintiff filed a general demurrer, and not a special demurrer. Thereupon, at the last term of the court, a jury was called and a trial had on said pleas. The jury found for the plaintiff in the full amount of the note, principal and interest. A new trial, on very many grounds, was then prayed for, and the motion was continued to this term. All the foregoing proceedings were had before the district judge presiding in the circuit court. At this term the motion for a new trial has been heard before the court, the circuit judge presiding.

We have carefully examined the pleadings in the case, the evidence submitted to the jury, the charge of the judge to the jury, the exceptions to the judge's charge and refusals to charge, and the verdict of the jury. We find that the evidence supports the verdict; that the judge's charge, if prejudicial at all, was in favor of the defendant, and that in refusing to charge as defendant's counsel requested, the judge was correct. And we conclude that none of the many grounds alleged by the defendant's counsel in support of the motion for a new trial are well taken. The only one that needs any discussion at all, and seemingly the only one relied upon by the learned counsel for the defendant — at least the only one supported by any authorities, — is whether the case was at issue on the merits; whether there was any issuable defense; whether the aforesaid plea as amended was a plea in abatement or a plea in bar.

The plea denies that the plaintiff is the owner of the note sued on; that she has any title to it whatever; that she has any interest whatever in it, or in the money alleged to be due upon it; and that she has no right to recover upon it.

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True it is that the other matters are alleged, and other conclusions therefrom drawn, but still the case shows, using the language of the supreme court in *Pendleton County v. Amy*, 13 Wall., 297, "that it was material to the plaintiff's case to aver as she did that she was the owner (bearer), and the plea took issue with this averment. It denied the title of the plaintiff, or her right of action, and though faulty in form, in substance it amounted to a defense." The counsel for defendant seem to labor under the impression that their plea was one solely to the jurisdiction of the court, and it is likely that such a plea was all they intended. But it is doubtful whether, in any event, the matters relied upon by them, to wit, a simulated transfer to give the court jurisdiction, can be otherwise pleaded than as a defense to the action.

The jurisdiction of this court depends upon the amount involved, the citizenship and the character of the parties, and the nature of the demand or cause of action. In suits upon promissory notes negotiable by the law merchant the jurisdiction depends solely upon the amount involved and the citizenship of the parties. In a controversy between a citizen of New York and a citizen of this district to recover the amount of a promissory note of over \$500 negotiable by the law merchant, this court has jurisdiction to hear and determine the rights of the parties. If, in any such suit at any time after it has been brought, it shall be made to appear to the satisfaction of the court, that such suit does not really and substantially involve a controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable in the United States courts, the court dismisses the suit, because, having jurisdiction to determine the rights of the parties, it determines that the party dismissed has no right. But be this question of raising the points allowed to be made, against an action under the 6th section of the act of 1875, whether by plea to the jurisdiction or by plea in bar, as it may, it

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seems to be clear that any plea that denies a material averment of the plaintiff — one that is material for him to aver and prove in order to maintain his action — is, of necessity, an issuable defense.

It has been held that in a suit brought by an administrator, a denial of his capacity as such administrator may be pleaded in bar. See *Noonan v. Bradley*, 9 Wall., 394. And the reason may be easily seen: if he is not administrator, he has no right to recover at all. His action is forever defeated.

The case of *Lester v. Piedmont, etc., Ins. Co.*, 55 Ga., 475, cited by counsel for defendants, was a case where no appearance whatever was made by the defendant; and the point decided was with reference to the power of a jury under the constitution of the state of Georgia. Code, 5091.

The case of *Jordan v. Carter*, 60 Ga., 443, is on the same point. But it is well to notice that while in the United States courts, in cases at law, we follow as near as practicable the practice, pleadings and forms and modes of proceeding of the state courts of record, yet the constitution and laws of the United States require all issues of facts in common law cases to be determined by a jury, unless the same is waived in writing by the parties; and the case of *Lester v. Ins. Co.*, *supra*, which the supreme court of Georgia decided to have been illegally submitted to a jury, would in this court have been necessarily submitted to a jury to assess the amount of damages claimed. The case of *Sheppard v. Graves*, 14 How., 505, criticises and reprehends loose and incongruous practice, with all of which we agree as applicable to this case, but we have to do here as the supreme court did there — take the pleadings as the parties have made them, and determine the rights of parties thereunder. That case shows nothing inconsistent with our views in this case.

In conclusion we notice that counsel for both plaintiff and defendant must have understood that the case was tried by the jury on its merits. In overruling the demurrer to the pleas the judge said: "Looking to the plea and amend-

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ment, it cannot properly be called a plea to the jurisdiction, though possibly it does contain some of the ingredients of a plea of that kind; yet, taking it as a whole, it is in my judgment in effect a plea in bar of the action, and I shall treat it as a plea in bar." And in the written memorandum of the charge to the jury we find the following: "As to the form of the verdict, I agreed with counsel for plaintiff and defendant, that if the jury found against the pleas of defendant, the verdict should be in favor of plaintiff against defendant for principal and interest on note; and that if the jury found in favor of the pleas, the verdict should be, "We find in favor of defendant's pleas," and no objection was made to this instruction.

And finally there is no showing made that the defendant has any just defense to the action in order to move the discretion of the court to relieve him of the verdict and judgment against him.

The motion for a new trial is overruled and discharged.

ERSKINE, District Judge, concurred.

MARCH, PRICE & CO. v. CLARK.

Under the code of Georgia, a draft drawn and indorsed by a married woman to pay the debt of her husband is absolutely void, even in the hands of a *bona fide* holder for value, and in a suit thereon the wife is not estopped to set up such defense by the fact that the draft recites that it was drawn for money loaned to her for her own benefit.

March, Price & Co. sued Mrs. E. A. Clark, a married woman, on her draft, of which the following is a copy:

"\$548.

ALBANY, GA., May 7, 1880.

"On fifteenth of October next pay to myself or order five hundred and forty-eight dollars, for cash furnished me to make my crops; this to be an advance under my mortgage to you of the twenty-third of January, 1880. Homestead and other exemptions and protest waived. E. A. CLARK.

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"To WELCH & BACON, Factors, Warehouse and Commission Merchants, Albany, Georgia."

The draft was indorsed by Mrs. E. A. Clark, and accepted by Welch & Bacon, who assigned the same to the plaintiffs before maturity.

The defendant pleaded that the draft was given by her to pay another draft drawn by E. M. Clark, her husband, and having been thus given, and not for any debt of her own, she was not liable therefor.

When the defendant offered evidence in support of the foregoing plea, plaintiffs objected on the ground that the draft had been transferred to them for value before maturity, and that such defense, however good against Welch & Bacon, could not avail against *bona fide* holders. This was the main question of law in the case. The opinion of the court upon it was as follows:

ERSKINE, District Judge. The defendant, Mrs. E. A. Clark, appears on the paper sued on as drawer and indorser. Welch & Bacon are primarily liable; she is only secondarily liable. It is a conceded fact in the case that the defendant is a married woman. The statute of Georgia (Code of 1873, sec. 1783) is as follows:

"The wife is a *feme sole* as to her separate estate unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract, she cannot bind her separate estate by any contract of suretyship nor by any assumption of the debts of her husband, and any sale of her separate estate made to a creditor of her husband, in extinguishment of his debts, shall be absolutely void."

Under this statute if this draft was made to pay a debt of defendant's husband, the draft is not merely voidable but void. It is a contract inhibited by the statutes of this state.

It was contended for the plaintiffs that the defendant was estopped from denying the recital in the draft, that the money was furnished her to make her crops, etc., especially

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as against *bona fide* holders of the paper. If the contract was not void under the statute cited, the court might so hold, but in view of the construction now adopted of that statute, the court is compelled to decide that defendant may offer evidence of the consideration as alleged in the plea. This, being a Georgia contract, must be governed by the law of Georgia, and the consequences above stated result from the position of the case.

The court will admit the evidence and submit the disputed questions of fact to the jury.

PACIFIC GUANO COMPANY V. HOLLEMAN.

1. A note payable to the order of a payee, who is described therein as "agent," may be sued on in his own name by the principal, who is the owner and holder thereof, without the indorsement of the payee.
2. In such suit parol proof is admissible to show that the principal is the holder and owner of the note.
(Before PARDEE and ERSKINE, JJ.)

This suit was brought by the Pacific Guano Company upon a note of which the following is a copy:

"\$419.30.

BYRON, GEORGIA, April 23, 1875.

"On the twentieth of October, after date, I promise to pay to the order of Asher Ayres, ag't, \$419.30, to T. B. Goff or at his office in Macon, Georgia, value received. If not paid at maturity, to bear interest at the rate of 12 per cent discount per annum.

D. H. HOLLEMAN." [SEAL]

The petition set out the note in full and alleged that the defendant, the maker of the note, delivered the same to Asher Ayres, the agent of the plaintiff.

The defendant demurred to the petition and also filed a plea to the jurisdiction, in which he alleged that the legal title to the note was not in the plaintiff, but in Ayres, the

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agent, who was a citizen of the district in which the suit was brought.

These issues were tried by the court, the parties having waived a jury and agreed upon the facts as follows:

"Asher Ayres, the agent named in the note sued on (and set out in the plaintiff's petition), is a resident of the southern district of Georgia. The Pacific Guano Company is a corporation having its legal domicile in the state of Massachusetts, and was the holder of the note sued on at the time of the commencement of the suit." The note does not appear to have been indorsed by the payee. The questions argued were whether the plaintiff could maintain the action on the note, and whether parol evidence was admissible to show that the note was in fact the property of the plaintiff.

Messrs. W. B. Hill and N. E. Harris, for plaintiff.

Mr. H. M. Holtzclaw, for defendant.

PARDEE, Circuit Judge. The agreement of counsel submits to the court two questions: (1) Whether, on the agreed state of facts, the plaintiff can maintain the action. (2) Whether parol evidence is admissible on the trial to show that the note is in fact the property of the plaintiff. The facts agreed on are that Ayres, the agent named in the note, is a resident of this district, and the plaintiff is the holder of the note sued on, and is a corporation domiciled in the state of Massachusetts. The other facts appear in the petition. We are agreed that both questions shall be answered in the affirmative. That a note given to Asher Ayres, agent, may be sued on by the principal, who is the owner and holder, is well settled by all the later authorities. *Arlington v. Hinds*, 1 D. Chipman, 431; *S. C.*, 12 Am. Dec., 704, and note; *Daniell*, Neg. Inst., § 1187; *Baldwin v. Bank of Newbury*, 1 Wall., 284.

The authority cited by counsel for defendant in 1 Addison on Contracts, § 51, does not apply, as that section relates to equities between the parties in cases of concealed agency.

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The case of *Austell v. Rice*, 5 Ga., 472, does not conflict, for the court in that case did not deny the right of the principal to bring the suit, but maintained the right of the payee named also to sue. To the same effect is the extract from the decision of Chief Justice Marshall in *Van Ness v. Forrest*, 8 Cranch, 30, for the point in that case was whether the payee named could sue, and his right was maintained. The admissibility of parol evidence to show that the plaintiff is the real owner and holder of the note sued on, when such ownership is put at issue by the defendant, is elementary. And in principle and authority the plaintiff may offer such evidence when in cases like this under consideration it may be held necessary for him to make such proof in order to maintain his action. See *Daniell*, Neg. Inst., § 1187, and cases there cited.

ERSKINE, District Judge, concurred.

NISBET, ASSIGNEE, v. THE MACON BANK & TRUST COMPANY
AND OTHERS.

1. Where two members of a firm are the president and cashier, respectively, of a bank, their knowledge of the insolvency of the firm is the knowledge of the bank.
2. A pledge cannot be made of stock in a bank by merely delivering to the pledgee the stock certificate; but there must be a transfer of the stock to the pledgee, on the books of the bank, or the delivery of the stock certificate must be accompanied by a power of attorney, authorizing a transfer of the stock, or by some assignment or contract in writing, by which the pledgee may assert title or compel a transfer.
3. A firm, two of whose members were the president and cashier, respectively, of a bank, agreed verbally with the directors to secure the bank for such balances as might from time to time be due it from the firm, by the pledge of the firm's certificates of stock in

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the bank. Stock certificates were accordingly placed, by the member of the firm who was cashier of the bank, in a separate box under his control, in the vault of the firm. The firm retained and exercised the right, without leave of the bank, of selling and assigning the stock, and of withdrawing the certificates and substituting others therefor. The bank had no power to sell the stock or assign the certificates. *Held*, that this did not constitute such a pledge of the stock represented by the certificates as would be valid against an assignee in bankruptcy of the firm.

IN EQUITY. Submitted on pleadings and evidence for final decree. The case is stated in the opinion of the court.

Messrs. W. B. Hill and N. E. Harris, for complainant.

Messrs. A. O. Bacon and J. C. Rutherford, for defendants.

PARDEE, Circuit Judge. For several years prior to June 6, 1878, R. W. Cubbedge, William Hazlehurst and J. W. Lockett, under the firm name of Cubbedge, Hazlehurst & Co., were engaged in the city of Macon in carrying on a general banking and brokerage business. On the said 6th day of June, 1878, the said firm failed in business and made a general assignment of their assets then on hand to W. W. Carnes for the benefit of their creditors. On or about the 25th of August, 1878, the members of said firm were on their own petition adjudicated bankrupts, and thereupon the complainant was appointed as assignee of said firm. On the 23d day of April, 1880, the assignee filed his bill in the United States court against the same firm, and against the members of the same in certain representative capacities, and against certain other parties, including the Macon Bank & Trust Company, the object of said bill being to set aside certain mortgages and transfers of property alleged to have been made by said firm prior to said assignment in fraud of the bankrupt act and in violation of its provisions. As to the other parties in the case, a decree has been had in this court affirming the validity of said mortgages and conveyances, and the case is now against the Macon Bank & Trust Company to set aside the transfer to it of two hundred and twelve shares of the capital stock of the said Macon Bank

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& Trust Company by the said Cubbedge, Hazlehurst & Co.

Complainant in his bill alleges that the transfer of said two hundred and twelve shares of stock to the Macon Bank & Trust Company by Cubbedge, Hazlehurst & Co., but a few days prior to said assignment, was fraudulent; that said firm of Cubbedge, Hazlehurst & Co. and the said Macon Bank & Trust Company were practically one organization; that the said transfer was made by Cubbedge, Hazlehurst & Co. when they were bankrupts and insolvent, and when they were in contemplation of bankruptcy and insolvency, and with the intent to work a fraud on the bankrupt act, and to defeat and delay the operation of said act; and that such intent was known to the Macon Bank & Trust Company at the time of receiving said transfer. The complainant also alleges that Cubbedge, Hazlehurst & Co. were stockholders to the extent of the two hundred and twelve shares of stock in the Macon Bank & Trust Company, and that said transfer was made for their personal benefit as such stockholders; and that said transfer was made within four months prior to the bankruptcy of said firm; also that said Macon Bank & Trust Company had cause to know that said Cubbedge, Hazlehurst & Co. were insolvent at the time, and that such transfer was made to prevent the property of Cubbedge, Hazlehurst & Co. from being distributed under the bankrupt act, and to impair, hinder, impede and delay the operation of said act, and was made within less than six months prior to the filing of the petition in bankruptcy.

The answer of the Macon Bank & Trust Company, as stated by its counsel, presents substantially the following case: It is admitted that the final transfer of the two hundred and twelve shares was made by Cubbedge, Hazlehurst & Co. to the Macon Bank & Trust Company on the date charged in the bill, but it is also averred that said transfer was simply a hypothecation of said shares of stock, made more than six months prior to the time of the said transfer, which hypothecation was made in good faith to secure a

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bona fide indebtedness of Cubbedge, Hazlehurst & Co. to the Macon Bank & Trust Company. The history of this hypothecation and subsequent transfer, as alleged in the answer, is, in brief, as follows: The capital stock of this bank was accumulated by the payment periodically of small instalments by the stockholders. Shortly after the bank began to run it was so crippled, by bad loans to a large amount, that the business of the bank could only be carried on by making some economical arrangement for its ordinary expenses. Accordingly, Cubbedge was elected president and Lockett cashier, on small salaries, with an arrangement that the business of the bank should be carried on in the banking office of Cubbedge, Hazlehurst & Co., thus saving bank rent. After this arrangement the Macon Bank & Trust Company received no deposits, and its own money, as it came in, was, when not otherwise loaned out, kept on deposit with Cubbedge, Hazlehurst & Co. The books of the Macon Bank & Trust Company showed what money was received for it, and the books of Cubbedge, Hazlehurst & Co. showed how much money they had on deposit of the funds of the Macon Bank & Trust Company. This amount naturally varied. As the money thus on deposit was loaned out for the Macon Bank & Trust Company, the amount of such deposit decreased; and, on the other hand, as money was paid in and not loaned out, the deposit increased.

The amount of these deposits was regarded by Cubbedge, Hazlehurst & Co. as a loan, as it indeed was. As this amount was constantly varying, and subject to call whenever needed in the business of the bank, and was being in fact daily called in part to meet the demands required in the business of the bank, no paper was made by Cubbedge, Hazlehurst & Co. to represent this indebtedness to the Macon Bank & Trust Company. It would have been impracticable to make papers that would correspond to the continual changes in the amount of such indebtedness. It would have been necessary not only to cancel the paper and make another each day, but a dozen or twenty times a day, as the balance to

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the credit of the Macon Bank & Trust Company constantly fluctuated, increasing as the money came in, and decreasing as it was paid out to borrowers, etc. Hence it was only practicable to have this indebtedness shown in the balances on the books. For the same reason, on account of the constantly fluctuating amount of the indebtedness, it was necessary to make a provision of a general character to secure the Macon Bank & Trust Company in the amount of this indebtedness.

It was therefore arranged and agreed between Cubbedge as president, and Lockett as cashier, on one part, and each of the three members of the firm of Cubbedge, Hazlehurst & Co. on the other part, that to secure the amount of this indebtedness of said firm to said bank, Cubbedge, Hazlehurst & Co. would keep continuously deposited with the Macon Bank & Trust Company, and hypothecated with the same, a sufficiency of the stock scrip of the firm in the Macon Bank & Trust Company. This arrangement and agreement was not only made between the said officers of the bank and the several members of the firm, but the same was reported to the directors of the Macon Bank & Trust Company, and by them approved and accepted. In May, 1878, the balance in favor of the bank against the firm was \$21,200, and the two hundred and twelve shares of said stock were formally transferred by the firm to the bank, the same being simply to fully transfer the stock thus previously hypothecated.

To the answer a formal replication is pleaded, and the case has been heard on its merits.

The evidence in the case sustains in the main the averments in the answer, with the unimportant modification that there was no actual possession or delivery of the stock in controversy until May 29, 1878, five days before the assignment to Carnes, and about ninety days before the adjudication in bankruptcy. Indeed, the evidence of the transfer stock-book of the bank is that part of the shares of that stock were acquired by the firm of Cubbedge, Hazlehurst & Co. on that day. See stock certificate, No. 253. That under

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the verbal agreement between Cubbedge, president, and Lockett, cashier, of the one part, and those gentlemen and Hazlehurst, forming the firm of Cubbedge, Hazlehurst & Co., of the other part, to protect the bank by hypothecating the scrip of the bank as security for such balances as might from time to time be due from the firm to the bank, various certificates of stock of the bank belonging to the firm were placed by Lockett, partner in the firm and cashier in the bank, from time to time, in a separate box under his own control in the vault of the firm, appears to be very probable; but it does not appear that any transfer or authority to transfer was ever given, nor that the certificates were retained by the bank as a certain deposit, but it does appear that the firm retained and exercised the right of withdrawal and substitution at their own convenience, and without consulting the bank. And it also appears that the stock so separated by Lockett never passed from the control of the firm and into the control of the bank until the 29th of May, 1878, for while the certificates were in the possession of a joint agent, the bank could not transfer, assign or negotiate them, and Cubbedge, Hazlehurst & Co. could.

What is necessary to constitute a valid pledge of stock in an incorporated company has been the subject of much discussion and learning, with resulting conflicting decisions, but although formerly there was doubt whether it could be the subject of a pledge at all, there is no doubt, in the absence of statutory provisions, that to pledge stock some written transfer or contract is necessary as against third parties. Mere handing over the certificate is not sufficient. There must be a transfer on the books of the company, or a power of attorney authorizing a transfer, or some assignment or contract in writing by which the holder may assert title and compel a transfer when desired. See *Law of Collateral Securities*, by Jones (Am. Law Rev., No. 2, February, 1880).

The only state where, I am informed, delivery of the certificate of stock is sufficient is Louisiana, and there only by express provisions of the code. See La. Rev. Civ. Code, art.

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3158. The decision of the supreme court of that state (*Blouin v. Liquidators of Hart*, 30 La. An., 714), which this court followed in *New Orleans Banking Ass'n v. Wiltz*, ante, page 43, was based on a written assignment, and the case of *Factors & Traders' Insurance Co. v. Marine Dry Dock Co.*, 31 La. An., 149, turned on the frauds committed by the pledgors, who were officers of the defending company.

In this state (Georgia), whose laws must control this case, the statute is specific that the thing pledged must be delivered. Ga. Code, § 2138. The case, then, is to be taken as showing an agreement to pledge such amount of stock as should be necessary, running through several years, accompanied by a separation of the certificates of stock, but no pledge until May 29, 1878, from which it follows that, as against the complainant as assignee in bankruptcy, the defendant bank is without good title to the stock in controversy, and must surrender the same or its value. There can be no pledge of property for the security of the payment of a debt without delivery of the thing pledged, cases of promissory notes and evidences of debt excepted. Ga. Code, § 2138. An agreement to pledge gives no privilege. *Casey v. Cavaroc*, 96 U. S., 467. Equity will not regard a thing as done which has not been done, when it would injure third parties who have sustained detriment and acquired rights by what has been done. *Id.*

The pledge made May 29, 1878, by the bankrupts to the defendant, is void under section 5128, Rev. St., for it was made by an insolvent with a view of giving a preference, and the person receiving had a reasonable cause to believe the pledgor was insolvent, and the same was within four months prior to adjudication in bankruptcy. There can be no doubt that the firm of Cubbedge, Hazlehurst & Co. were insolvent, and that Cubbedge and Lockett knew it, nor can there be any doubt that the knowledge of the president and cashier of the bank was the knowledge of the bank. See *Wade*, Notice, § 675. The very transaction itself, under

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the light of this case, puts the pledge of May 29th within the statute.

For years the verbal agreement to keep the bank secured with its own scrip was allowed to run with no note, no transfer, nothing but Lockett's box, which he emptied and replenished as the exigencies of the case required, when, five days before the crash, the most formal of notes and formal of pledges were put in writing, duly witnessed, and the stock transferred on the books besides. The parties had slept too long on this agreement for a continuous hypothecation to have been awakened without occasion of some kind. What could it have been? Not the insolvency of Cubbedge, Hazlehurst & Co., for they had been insolvent for years. Not new business methods, for no change appears to have been made among the managers of the bank. There is no showing of a sudden want of the bank for either money or collaterals. In short, no explanation is given or attempted, and it is a fair inference from the circumstances that bankruptcy was contemplated, and therefore the long standing agreement to hypothecate stock scrip to secure the bank was carried out, so that the bank might be protected in preference to other creditors.

The other branches of this case, *i. e.*, as to transfers being void because of usury in the debt secured by the transfer, need not be discussed nor decided.

The complainant should have a decree adjudging him entitled to the two hundred and twelve shares of stock in controversy, and compelling the Macon Bank & Trust Company to deliver the same in kind or in value; the latter to be fixed by reference to a master, as the evidence in the case is incomplete on that point.

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PETER C. SAWYER v. MILLER AND OTHERS.

1. The first and fourth claims of reissued letters patent No. 6,169 of Peter C. Sawyer are either repugnant, or they do not describe with the requisite clearness and certainty the inventions intended to be covered thereby.
2. A combination to be patentable must produce a different force or effect or result from that produced by the separate parts of which the combination consists.

IN EQUITY. Final hearing on pleadings and evidence.

The bill was filed to restrain the infringement of reissued letters patent No. 6,169, granted to complainant Peter C. Sawyer for an improvement in cotton-gins.

The first claim of the reissued patent was: "the front H, with interior curve, the center board f, with interior, and the curved upper portion of the ribs d, combined and forming the major part of a circle in the roll box, so that the cotton is ginned by the saws in a circular roll."

The fourth claim was: "the swinging front H hinged at the upper end, and both the upper and lower ends made adjustable."

It was contended by counsel for the defendant that these two claims were inconsistent, because the combination which the first claim was intended to cover could not exist except only at one particular adjustment of the gin, and that any change which the second claim was intended to make in this adjustment would destroy the combination covered by the first claim. The other facts necessary to the comprehension of the case are stated in the opinion of the court.

Messrs. A. O. Bacon, John C. Rutherford and F. J. M. Daly, for complainant.

Messrs. G. W. Gustin and W. C. Winslow, for defendants.

PARDEE, Circuit Judge. The complainant brings his bill against the defendants for infringement of his patent "for an improvement in cotton-gins," being reissued patent No. 6,169.

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The invention claimed relates particularly to the cotton box or hopper of a cotton-gin, and consists in the construction of the swinging front cotton board and ribs to form the main portion of the cotton box perfectly round without any sharp corners, etc. The infringement alleged relates to the following specifications: (1) The front, with interior curve, the cotton board, with interior curve, and the curved upper portion of the ribs combined and forming the major part of a circle in a roll box, so that the cotton is ginned by the saws in a circular roll. (2) The swinging front hinged at its upper end, and both the upper and lower ends made adjustable.

The evidence shows that some time in 1876 the defendants made and sold cotton-gins in which the cotton roll box, as to circular form, was apparently the same as the specifications of complainant's patent, but that they have made none since.

Also that the patent issued to Orren W. Massey, original letters patent No. 167,679, is identical with complainant's reissued letters patent No. 6,169, of prior date. The defenses in the case are: (1) Inconsistency in description of alleged invention; (2) no invention to warrant a patent, taking into consideration "the state of the art" at the time; (3) prior invention of Massey.

The first thing that struck my attention on the hearing was that the thing itself, as represented by the drawings produced, did not agree with the description and specifications, and that it could only be made to agree by one particular adjustment of the swinging front, and that at every variation from that particular adjustment, the front, the cotton board and the upper portion of the ribs ceased to combine and form the major part of a circle, as required by the first specification. A careful examination since satisfies me that there is a serious inconsistency between the first and fourth specifications, or else a failure to describe with clearness and certainty what is the invented patent. As to the effect of a failure to clearly describe the invention, see

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Evans v. Eaton, 7 Wheat., 434. And here the matter becomes directly important, for there is nothing in the evidence to show whether the boxes of the gins made by the defendants, claimed as an infringement, had adjustable fronts or not; and if not, the boxes of those gins could not, as shown by the drawings, be in anywise an infringement, because the several parts necessary could not be combined so as to form the major part of a circle. The case shows that at and long prior to the claimed invention of complainant, cotton-gins were in use with so-called circular roll boxes. The front was curved, and so were the cotton boards and the upper portion of the ribs. The parts were formed on the axes of various-sized circles, not similar circles, having a common center, according to the idea of the manufacturer. The alleged invention is merely to combine these well-known parts so as to form with them the major part of the same circle, leaving just what we had before — a circular roll box doing the same work in the same way, and (under the evidence) with doubtless better results.

“A mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such an invention as will sustain a patent.” *Smith v. Nicholls*, 21 Wall., 119. See, also, *Roberts v. Ryan*, 91 U. S., 159; *Dunbar v. Myers*, 94 U. S., 199.

As to the effect of mere change of form, see *Winans v. Denmead*, 15 How., 330, and *Eddy v. Dennis*, 95 U. S., 569.

In *Reckendorfer v. Faber*, 92 U. S., 347, we find: “The combination to be patentable must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements.”

In this case the combination is not shown to produce a different force or effect or result from that given by the sep-

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arate parts. The claim even of less friction in the roll is not sustained by the evidence. Argument is made, supported by authority, that the issuance of a patent makes a *prima facie* case — *First*, that the thing is patentable; and *second*, that the patentee is the original and first inventor. But this case so made is *prima facie* only. *Reckendorfer v. Faber, supra*. Here, I think, both points of the claimed *prima facie* case are overcome. The first, for the reasons hereinbefore given; and the second, by the showing made that the commissioner issued a subsequent patent for the same invention to Massey after and based upon the decision of the examiner of interferences that Massey, and not complainant, was the prior inventor.

On the whole case I am not satisfied that the specifications of the claimed invention are in “such full, clear and distinct terms as to distinguish the same from all others before known,” nor that the same is patentable, nor that complainant was the original inventor. The bill must therefore be dismissed, and a decree to that effect will be entered.

NOVEMBER TERM, 1882.

UNITED STATES V. WILDER.

1. A defendant charged with the offense of smuggling submitted to the court his petition, verified by affidavit, showing that witnesses material to his defense were beyond seas, and praying for a *dedimus potestatem* to take their depositions, by virtue of section 866 of the Revised Statutes. *Held*, that the writ should issue, the question of the admissibility of the depositions being reserved till the trial.
2. In case of conviction, such deposition might properly be considered by the court in imposing sentence.

INFORMATION FOR SMUGGLING. Heard upon petition for *dedimus potestatem* under section 866, Revised Statutes.

Mr. Henry R. Jackson, for the petitioner.

Mr. S. A. Darnell, United States Attorney, *contra*.

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PARDEE, Circuit Judge. The defendant, who is charged by the United States attorney with smuggling, submits a petition and affidavit showing that he has witnesses beyond the United States who are material to his defense, and he asks a *dedimus potestatem* to take the depositions of said witnesses, under section 866 of the Revised Statutes. The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority, to take the evidence of witnesses in criminal cases by commission, and that the evidence, if taken, would be inadmissible on the trial.

It is so abhorrent to all ideas of justice that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case may be and probably is unprecedented in the United States courts in criminal cases, but I am informed is permitted in state courts in Georgia, and is allowed by statute in other states. At all events, the government cannot be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence in the case.

Let the commission issue as prayed for; the district attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this court.

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APRIL TERM, 1883.

ÆTNA INSURANCE COMPANY V. MARTHA BRODINAX AND OTHERS.

1. A deed for land in Georgia, made by a husband to a trustee in trust for the use and benefit of his wife, provided that the land conveyed should be free from the debts, contracts and liabilities of her husband, except such incumbrances and liens as by the written direction of the grantor and his wife might be placed thereon. *Held*, (1) That the power to incumber contained in said deed was not contrary to the code or policy of the state of Georgia. (2) That a mortgage upon the land, executed by the written direction of the grantor and his wife, was a valid incumbrance thereon.
2. The provision for incumbrances in such deed is not inconsistent with the grant and does not render the deed void.
3. Under such a deed a valid mortgage could be made to secure a debt of the husband past due.

IN EQUITY. Heard upon pleadings and evidence for final decree. The case is stated in the opinion of the court.

Mr. Joseph Ganahl, for complainant.

Messrs. J. B. Cumming and Geo. A. Mercer, for defendants.

McCAY, District Judge. On the 11th day of June, 1866, Benjamin E. Brodinax, of the county of Richmond, Ga., executed a deed in due form under the laws of Georgia and in consideration of his love for his wife, Martha Brodinax, to a certain parcel of land in said county, to William E. Brodinax, in trust for the said Martha during her life (with other limitations not here important to be considered). The deed contained various other provisions—as for the alienation and reinvestment of the estate; for the appointment of a new trustee in case the trustee Brodinax should fail to act or die; also for the making of liens and mortgages on the property. In each of which cases it was provided that the husband and wife should, in writing, join in what was done.

The deed declared that the property should be for the use, benefit and behoof of the said Martha, free from the debts,

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contracts and liabilities of her present or any future husband (except such incumbrances or liens as by the written direction of the grantor and the said Martha might be made thereon). W. E. Brodinax accepted the trust. In January, 1858, he resigned, and the grantor and wife, in writing, appointed Ephraim Twedy as successor, who accepted. On the 14th of June, 1866, three days after the date of the deed, the trustee, in pursuance of the written request of the grantor and wife, executed a mortgage deed of the premises to the treasurer of the Soldiers' Loan and Building Association, a body corporate, to secure the loan of \$2,000.

On the 11th of May, 1867, the trustee, in pursuance of the written request provided for in the deed, executed another mortgage to the complainant, for \$3,000, the same being a debt due by note from the said Benjamin to the complainant. On the 4th of December, 1868, the complainant bought the first mortgage, and this bill is filed to foreclose these two mortgages. The defense set up is practically as follows: That both the debts secured by the mortgages were the individual debts of Benjamin E. Brodinax, and that under section 1783 of the Georgia code, it is *illegal* for the wife to pledge her separate estate to secure her husband's debts.

Issue was taken as to the debt covered by the first mortgage, and though the wife testified that she got no part of the proceeds of the said debt, yet it did not appear very clearly that the trustee did not, nor in fact whose debt it was, nor what was the consideration.

As, however, under the view I take of the case, it is wholly immaterial whether it was the debt of the wife or the husband, it is unnecessary to go into that question. The sole question in the case is, whether under such a deed it is competent for a married woman, under the laws of Georgia, to pledge the estate granted for her husband's debts. By the terms of the deed it was to be free from the contracts, debts and liabilities of the husband, except such liens and incumbrances as they might jointly, in writing, agree to place upon it. This language can have but one meaning. It is an ex-

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ception to the clause of the deed which declares the property was not to be subject to the debts, etc., of the husband; and the inference is almost conclusive that the intent was to say — unless *these debts*, etc., are by the written direction of both husband and wife, by special lien, or incumbrance, made such a charge thereon. It has been argued that this provision was inconsistent with the grant and therefore void; but it is well settled that such restrictions on a separate estate to a married woman are not to be construed like restrictions on a legal estate to persons *sui juris*.

The wife has only such power as the deed gives her, and the whole deed is to be taken together; an inconsistency to be void must be totally inconsistent — must destroy the estate; if it only fetter it or qualify, it is still good. 2 Story's Eq., secs. 1382–1384, and the cases there referred to. See, also, 24 Ga., 52. And this is the law of Georgia even of legal estates to persons *sui juris*. Sec. 2697, Code of 1873. So that this case must turn, as I think, solely on the special provision of the Georgia code of 1863. That code, in substance, provides, first: That to create a separate estate in the wife no words of separate use are necessary. The appointment of a trustee, or any words sufficient to create a trust, is enough. Sec. 23, Code 1873. Hence under this deed a separate estate would be created although no words of separate use are used. The code also provides as follows: Code, sec. 1783. "The wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But whilst a wife may contract she cannot bind her separate estate by any contract of securityship nor by any assumption of the debts of her husband; and any sale of her separate estate to a creditor of her husband in extinguishment of his debt shall be absolutely void."

It may be added that the supreme court of Georgia before the adoption of the code had established the doctrine that however general the words of a deed to a married woman were, yet if it provided, as does this, that the estate was to

be free from the debts, contracts, etc., of the husband, these were words of restriction upon the wife, and she could not pledge her estate for her husband's debts.

Taking these decisions and the provisions of the code together, it is contended that admitting the words of this deed to be a power to so pledge, yet nevertheless the power does not exist, because such a power is illegal, contrary to the statutes, and therefore void.

It is claimed that whatever may be the words of the deed, however strong the language of the grantor, it is illegal, and therefore impossible for him to make it one of the terms of the grant that the grantee, if she be a married woman, shall have power to pledge the estate for the debt of her husband.

It is claimed that the statutes plainly indicate it to be contrary to the policy of the law, that a married woman shall under any circumstances have such a power.

Without question, if she be restricted by the terms of the deed, or if the deed be general, she would not have that power. But here is a case where the power is expressly declared. There is first a separate estate created in the wife, and this is plainly upon condition on the part of the grantor that he and the wife may put liens upon it to secure his contracts and liabilities. This property belonged to the husband. Of his own free will and for the love he bore his wife he gives it to her on these terms. Did she ever get any estate except according to these terms and with this power? What was the intent of the statutes? Plainly to protect the wife in the *estate* granted, to provide that if anybody saw fit to give a married woman an estate with the expressed intent that it should be for her benefit, she should neither be "kicked nor kissed" into an appropriation of it, and to declare that any separate estate coming to her other than by deed, or in any unqualified way, shall not be capable of being used by her to secure her husband's debts or to discharge them. This clause, however, it will be noticed, does not declare that a deed granting an estate to a married woman may not qualify that grant by declaring that she

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shall have power so to pledge it. It is perhaps wise enough that the law should restrict her when the deed is silent, or when she becomes the unqualified owner of a separate estate. It is fair enough to infer that if one intends a married woman to have an estate she shall not be subject to the influences of her husband for its appropriation to the security or payment of his debts. But if the grantor expressly say that she shall have such a power, is not the inference that she cannot exercise that power a most shocking one?

The mistake is in supposing that it was the intent of the law to protect the wife; to establish a rule of domestic or marital economy that under no circumstances shall a "Georgia" wife be in such a position as that she shall be capable of using an estate for the payment of her husband's debts, even if the grantor of that estate so expressly declared, or even if that be one of the terms of the deed in which the grant is given. To lay down such a rule would, as I think, be a great wrong to married women. Many a husband would be willing to settle property on the wife provided she had the power to come to his relief on proper occasions, who would refuse to do so if in such a contingency she was to be powerless. Many a father-in-law would be willing to settle property on his son's wife provided she had such power, who would decline to do so if she was to be powerless in case of pecuniary trouble on the part of her husband.

And this view of the meaning of this section is in harmony with the history of separate estates and with several other instances in the law of disability put upon persons for the performance of otherwise legal acts.

At common law a wife could make no contracts, sell no land, could not even make a will; yet it was always held that if the instrument creating an estate gave such a power, even a married woman might execute it.

So, too, an infant may, by a deed creating an estate in his favor, be clothed with power to dispose of it by will before he becomes capable of making a will generally. Indeed, it may be stated as a general rule, that if an instru-

ment creating an estate provide for some specific mode of its disposition, that it not only must be disposed of in that way, but that it may be sold and disposed of in that way, although the person to whom the power is given would not, under the general law, have a capacity to do such acts.

And this proceeds in the idea that the owner of property has power to dispose of it or provide for its disposal at his discretion.

The contention that this provision of the Georgia code is intended to declare it to be the policy of the state that under no circumstances shall a married woman have such a power, seems to me far fetched and calculated to place an unnecessary and unnatural restraint upon the disposition of property to married women. The code is, in my judgment, intended not to protect the wife, but to protect the estate granted to her; to carry out either the expressed or the presumed intentions of the grantor; and generally to say, if she have an estate to her separate use, she shall not dispose of it to pay her husband's debts. This is a different thing entirely from the case at bar, where it is distinctly provided if the wife see fit — if she and her husband concur in writing — that such a power shall exist. She only gets the estate on these terms; and to say that she shall not exercise the power thus expressly granted, is to confer on her an estate never contemplated by the grantor.

Nor, as it seems to me, is there any analogy between a case like this and the case of a limitation over contrary to law or to public policy, as conditions in the restraint of marriage, and the like.

These cases, as their history shows, turn upon the public evils growing out of such limitations and restrictions; whilst the history of this provision shows an intent to protect the estate of the wife, and not to establish such a rule of the marital relations as would say that it shall be illegal for a grantor to put the wife in any such situation. Upon the whole, therefore, I am of the opinion that the original deed conferred upon the wife the power here complained of,

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and that being the case, the mortgages are good, even though they be securities for the debt of the husband.

Something was said in the argument to the effect that as a second mortgage was made to secure a past-due debt of the husband, it was therefore without consideration; but if this was his debt it comes within the scope and intent of the deed whether then due or merely then contracted. The husband made the deed on these terms, and if this was his debt the deed gives her power by joining in a written request to secure it.

Ordered that a decree of foreclosure for the amount due be entered upon the minutes of the court.

H. M. SAENGER v. WILLIAM NIGHTINGALE.

1. In a suit to foreclose a junior mortgage, and to set aside a sale and deed made upon the foreclosure of a prior mortgage executed by the same mortgagor, his letters are not admissible in evidence against himself and the purchasers at the foreclosure sale to show that the first mortgage had been satisfied before the decree of foreclosure was made, without evidence of a conspiracy between the mortgagor and the purchasers, who were assignees of the first mortgage, to keep it open after it had been satisfied.
2. In such a case evidence that the first mortgage, and the debt which it secured, were transferred to the purchasers without consideration, will not avoid the decree of foreclosure and the sale made under it.
3. A foreclosure and sale under a first mortgage, made in a suit brought, no party in interest objecting, in the name of the mortgagee, after the mortgage debt and mortgage had been transferred by him to another, is not void, and cannot be assailed on account of such transfer, by a junior mortgage.
4. A junior mortgage, in a suit brought by him to foreclose his mortgage against a purchaser at a foreclosure sale, made under a prior mortgage executed by the same mortgagor, cannot set up against the decree under which the foreclosure sale was made that the prior mortgage had been barred by the statute of limitations before the decree of foreclosure was made.

Heard upon pleadings and evidence for final decree. The opinion states the case.

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Mr. H. B. Tompkins, for complainant.

Messrs. R. E. Lester and *W. S. Bassinger*, for defendants.

McCAY, District Judge. This was a bill filed by complainant against William M. Nightingale and others on the following statement of facts:

On the 30th of January, 1855, P. M. Nightingale, the father of the defendants, made a mortgage to Charles Spaulding of "Cambress Island," in the county of McIntosh, Georgia, to secure \$100,000. The mortgage also included a number of slaves, the debt being for the purchase money of the land and slaves. The \$100,000 was evidenced by certain bonds due at various dates from 1856 to 1862. Of this debt \$35,000 was paid. In March, 1856, this mortgage was transferred by Spaulding to E. Mollineaux. In March, 1870, Mollineaux's executor and the mortgagor adjusted this debt thus:

A certain plantation known as Dungeness was deeded by Nightingale to the Mollineaux estate, and a certain allowance made to Nightingale in consequence of the emancipation of the slaves. And it was finally agreed that the mortgage debt should stand at \$51,250. In 1872 the executor of Mollineaux, in the name of Spaulding, for his use, proceeded to foreclose the mortgage in the state court, and in November, 1872, a judgment of foreclosure was rendered, and under this judgment the property was sold at sheriff's sale in McIntosh county, and bought by the defendant, William Nightingale, for himself and the other children of P. M. Nightingale, the mortgagor; and in pursuance of said sale they were put in possession of said property, and they are now holding and claiming the said property as their own. This mortgage had been duly recorded under the laws of Georgia within a few days after its date.

Previously to this foreclosure a transfer of the mortgage had been made by those interested in the Mollineaux estate to the defendants, William Nightingale and the other children of the mortgagor, in consideration of their release of

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the Mollineaux estate of any claim they had or might have to the Dungeness property, previously sold by their father to the Mollineaux estate in part satisfaction of the mortgage debt.

On the 6th of December, 1869, P. M. Nightingale, father of the defendants, became indebted to the complainant in the sum of \$30,000, and to secure the same mortgaged to him "Cambress Island."

The object of this bill is to set aside the sheriff's deed to the Nightingales under the foreclosure of the first mortgage, and to subject the property to the lien of the mortgage held by the complainant. The bill charges that the first mortgage was fully paid off, or settled before a foreclosure, and fraudulently kept open; but at the hearing there was not only no evidence to sustain this charge, but on the contrary, it was shown that the deed to Dungeness and the adjustment for the emancipation of the slaves, left still due on the first mortgage about \$51,250. On the trial, various letters of P. M. Nightingale, the mortgagor, were offered, in order to show by his statement that the first mortgage was settled, but the court rejected the letters as not competent to show, as against the defendant, such settlement. They are only the unsworn statements of one interested to make them, and are not evidence at all against the mortgagor or against one purchasing at the foreclosure sale, unless there was evidence, which there is not, of a conspiracy between the defendants and P. M. Nightingale to keep open this mortgage after it was settled. It was contended that there was no consideration for the transfer of the mortgage to the Nightingale children, that there is no evidence that they had any claim to Dungeness; but I think that is wholly immaterial. If the mortgage was valid at the time and unpaid, it would make no difference to the complainant even if the transfer made no pretense of consideration. It was also insisted that the foreclosure of the first mortgage was void because the transfer was made before the proceeding for foreclosure commenced. The fore-

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closure was in the name of the original mortgagee and was not objected to by any person having an interest in the mortgage. Any person having such interest would have a right, if he saw fit, to foreclose in the name of the original mortgagor. If the real owners of the mortgage have not and do not complain, what is that to the complainant? These facts, as well as the consideration of the transfer, the delay in the foreclosure, are all matters to be considered in determining whether or not the mortgage was paid off or in any way settled; but the evidence of Mr. Lawton and his partner is so plain and positive as to leave no doubt that after the deed to Dungeness, and after the adjustment for the emancipation of the slaves, there was still due on the original mortgage debt over \$50,000. Nor does it make any difference if Mrs. Mollineaux, who, it seems, was quite a wealthy woman and an especial friend of the family, took little care to press for her money. Nay, it seems to me, if her debt was really unpaid, she would have a right, since it was the oldest lien, to keep it and deliberately and intentionally and openly use it for the purpose of preserving the old home of the children of the family. If the mortgage debt was a subsisting lien and older than the complainant's mortgage, it would be no concern of his for whose benefit it was used. Her transfer of it for a small consideration, as for the quit-claim deed to Dungeness, or even as a gift to the Nightingale children, are facts which, with other circumstances, if any such were in proof, might go to give color to the charge that the mortgage was paid off, or in fact was settled; but the evidence fails to show this, or to give any other facts to be aided by her conduct in the premises. At last, therefore, this case, as I think, stands alone upon the point made by the complainant and admitted by the answer, to wit: that the first mortgage became due before the 1st of July, 1865, and was not foreclosed until some time in 1872, and that, therefore, the mortgage debt as well as the mortgage was barred by the statute of limitations of the Georgia legislature passed in 1869. That act provides that

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all proceedings to recover any debt due before the 1st of June, 1865, shall be begun by, on or before January 1, 1870, or the right of action should be perpetually barred. This mortgage debt was due before the 1st of June, 1865, and the proceedings to foreclose were not commenced until more than a year after the statutory bar attached, so that it comes within the terms of the statute; and had the mortgagor set up this defense to the foreclosure, so far as it now appears it must have been successful. The case as presented is therefore as follows: Complainant has an unexpired mortgage. The defendants are in possession claiming title under a sheriff's sale, made by virtue of a foreclosed mortgage, but to which judgment of foreclosure the mortgagor might, had he seen fit to do so, have pleaded the limitation act of 1869, and defeated the foreclosure. The claim of this bill is that the complainant has now a right to intervene, to say to the defendants that the mortgage under which they claim title was, at the date of the proceedings to foreclose, barred by the statute of limitations, and as his mortgage was then, and still is, a subsisting, *bona fide* lien, he has a right to foreclose and sell notwithstanding their purchase. I do not think the complainant is estopped in any legal right he might have by the judgment of foreclosure.

Under the laws of Georgia he is not either a necessary or a proper party to the foreclosure, and he is not bound by the judgment.

The cases decided by the supreme court of Georgia upon this point do not exactly settle that the complainant is not bound by the judgment, because in them the mortgagor, at the commencement of the proceeding, had parted with all his title to the property, and the court in its decisions laid stress upon the gross injustice of permitting the mortgagor, after he had sold his equity of redemption, and at the time when he had no interest at all in the land, by any act of his to bind a party having a lien on the property. Still I am inclined to the opinion that the principle of these decisions

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is based on the fact that the second mortgagee, not being a party to the judgment, nor a privy to it, is not bound by it. These cases, however, do establish that a purchaser of the mortgagor's title is not bound by any judgment against the mortgagor had under proceedings commenced after the date of his purchase, and if the holder of such a judgment, or of any other claim, attempts to interfere with his purchase, he has the same right of defense as the mortgagor would have. It is, without doubt, well established as a general proposition, that pleas of usury, of the statute of limitations, and the like, are personal pleas or privileges, and that no person can take advantage of them but the one primarily interested. One creditor cannot set up that another creditor's debt is usurious or barred by the statute, or is subject to any other plea of a personal and privileged character. There is, however, a well established exception to this rule, to wit: that a purchaser of the title from the mortgagor, unless it be one of the cases where he is estopped as being a party or privy to the judgment of foreclosure, may always, when it is attempted to set the judgment of foreclosure in motion against his title, attack it by setting up the same defenses as the mortgagor might have done had he seen fit so to do. This doctrine is based upon plain principles of justice and common sense, to wit, that a purchaser of property from anyone has the right to resist any claim against it, just as his vendor might, except in such cases as by the rule of law he is estopped; and that in a judgment foreclosing a mortgage against the mortgagor in proceedings begun after the date of his purchase, he is not estopped unless he be a party to the judgment. This rule has been adopted and enforced in Georgia.

It will, however, be noticed that in all these cases the defendant was the purchaser of all the mortgagor's rights; that he had the title to the premises, subject, of course, to the mortgage, so far as it would be an irresistible claim as against the mortgagor. There are, so far as I can find, no cases, except the California cases, giving this right to a subsequent

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mortgagor who has not the title — who has only a debt with a mortgage lien. He does not stand in the position of the defendant; he does not have the title to the premises with the rights incident to every title, to defend it against all claims whenever they come, except in the cases where, under a settled rule of law, the grantor has by his acts estopped him; as if, for instance, before his purchase the grantor had submitted to a judgment. In such a case, being a purchaser after the commencement of the proceedings, he is a privy to the judgment, and is therefore bound by it just as his grantor would be. Without question there are several California cases where this privilege is also allowed to a subsequent mortgagee, but these cases are anomalous, and are made by the court to depend on the peculiar language of the California statute. The first case is *Lord v. Morris*, 18 Cal., 482, though under the facts of that case it would be clear, even under the Georgia cases, the second mortgagee would have a right to set up the statute. The second mortgage was not made by the maker of the first mortgage. He had sold the fee to the third party, and it was the mortgagee of these purchasers who was permitted to insist that the first mortgage was barred by the statute. They had a right to stand in the shoes of their mortgagor, and, as he was a purchaser of the title from the first mortgagor, they had the same right he had. It is true the court, in delivering its opinion, does announce the general rule, that by reason of the peculiar character of the California statute a different rule prevails in that state from other states and in England; and one of the leading peculiarities to which the judge refers is that the California statute bars the mortgage whenever the debt is barred; and he specifically refers to the case of *Elkins v. Edwards*, 8 Ga., 325, as an instance how the Georgia statute differs from that peculiarity of the California statute on which that court bases its opinion. In that case the mortgagor had made a subsequent promise to pay the debt and keep up the mortgage, but the court held that as at that time

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he had parted with his title, no act of his could give validity to the barred lien.

In the case before me, Nightingale, the father, was still the owner of the title when he allowed this judgment of foreclosure to go against him. There are other California cases referred to, to wit, *Coster v. Brown*, 23 Cal., 142, and *Grattan v. Wiggins*, 23 Cal., 16, but in both these cases, though the language of the court extends to a mere mortgagee, yet, in fact, the parties who were permitted to plead the statute were the persons who had bought the title from the mortgagor, and were, under decisions in this state — Georgia — entitled so to plead. Upon the whole, therefore, I am of the opinion that the subsequent mortgagee has no more right to plead the statute, as though he stood in the shoes of the debtor, than any other creditor. He has no title to the land. He has nothing but a mortgage lien. The Georgia courts have decided that a judgment creditor could not set up, as against another judgment creditor, that the debt of the latter was tainted with usury, and there is nothing in a Georgia mortgage putting the mortgagee in a better position than a judgment creditor. It is true he has a lien on the land, but so has the creditor by judgment. It is true, also, that our courts have said of the mortgagee, that if he obtains his mortgage without notice of a secret lien, he is for his protection to be treated as a purchaser. Not that he is a purchaser, but that he is to be treated as such for his protection. But he has yet no title, nor was it the intent of these decisions so to hold, because the statute in express terms says that in Georgia the mortgagee has no title, but only a lien. I am therefore of the opinion that a decree ought to be entered for the defendant, the children of P. M. Nightingale, denying the prayer of plaintiff's bill.

NORTHERN DISTRICT OF GEORGIA.

AT CHAMBERS, JULY, 1880.

IN RE HENRY P. FARROW AND JOHN S. BIGBY, CLAIMANTS OF
THE OFFICE OF UNITED STATES ATTORNEY.

1. Section 2 of article II of the constitution of the United States, which declares that "the president shall have power to fill up all vacancies which may happen during the recess of the senate," authorizes the president to fill a vacancy which happened during the session of the senate and continued to exist after the senate had adjourned.
2. The filling of a vacancy in the office of district attorney or marshal, by a circuit justice, under authority of section 793, Revised Statutes, does not preclude the president from making an appointment to the same office during a recess of the senate.

The parties to this controversy agreed with each other to submit the same to the court without pleadings and upon the following agreed statement of facts:

"Henry P. Farrow held the office of United States attorney for the northern district of Georgia, by appointment of the president, with the advice and consent of the senate, for a term which expired April 19, 1880, during the session of the senate. On April 23, 1880, Mr. Justice Bradley, circuit justice for the fifth circuit, appointed Mr. Farrow to the same office, under the provisions of section 793 of the Revised Statutes of the United States, which appointment Mr. Farrow accepted. He qualified and now claims the office under it.

"The president on the — day of May, 1880, nominated John S. Bigby to the senate for the office. The senate adjourned on the 16th day of June without acting on this nomination.

"On the 6th day of July, 1880, during the recess of the senate, the president issued a commission to Mr. Bigby for the office, which he accepted. On the 12th day of July,

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1880, he qualified under this commission, and now claims the office under it. The senate is still in recess.

"The order of Mr. Justice Bradley appointing Mr. Farrow, and the president's commission to Mr. Bigby, are before the court as parts of this statement, and also their oaths of office."

It was agreed that the foregoing statement should go before the court in lieu of pleadings and evidence, and that the court should thereon decide which of the claimants was entitled to the office.

Mr. Amos T. Akerman, for Henry P. Farrow.

Mr. Wm. H. Smith, for John S. Bigby.

WOODS, Circuit Judge. It is claimed by counsel for Farrow that the appointment by the president of Bigby was, under the facts of the case, beyond his constitutional power, and he cites the third paragraph of section 2, article II of the constitution of the United States, which declares: "The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." He also relies upon section 1769, United States Revised Statutes, which declares: "The president is authorized to fill all vacancies which may happen during the recess of the senate by reason of death or resignation or expiration of term of office, by granting commissions which shall expire at the end of their next session thereafter."

The contention is that the vacancy in the office of district attorney, which the president has undertaken to fill by appointment of Bigby, did not happen during the recess of the senate, and therefore the power to fill it does not reside in the president.

On the other hand, it is claimed that the phrase, "vacancies that may happen during the recess of the senate," when properly construed, means vacancies which may happen to exist during the recess of the senate.

In support of this latter view, the practice of the executive department of the government for nearly sixty years is in-

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voked, and the concurring opinions of ten of the distinguished jurists who have filled the office of attorney general of the United States are cited.

The first opinion given upon this point is that of Mr. William Wirt, attorney general under President Monroe (1 Opp., 631), in which he argues for the construction claimed in support of the president's action in this case. He says: "In reason it seems to me perfectly immaterial when the vacancy first arose, for whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the president is called on to act. Is the senate in session? Then he must make a nomination to that body. Is it in recess? Then the president must fill the vacancy by a temporary commission.

"This seems to me the only construction of the constitution which is compatible with its spirit, reason and purpose, while at the same time it offers no violence to its language, and these are, I think, the governing points to which all sound construction looks."

This opinion of Attorney General Wirt was subsequently concurred in by Mr. Roger B. Taney, attorney general under President Jackson. See his opinion dated July 19, 1832 (2 Opp., 525). Mr. Taney says in construing that clause of the constitution under consideration: "It was intended to provide for those vacancies which might arise from accident and the contingencies to which human affairs must always be liable. And if it falls out that from death, inadvertence or mistake an office required by law to be filled is in recess found to be vacant, then a vacancy has happened during the recess, and the president may fill it. This appears to be the common sense and the natural import of the words used. They mean the same thing as if the constitution had said, 'if there happen to be any vacancies during the recess.'"

It is not necessary to quote from the opinions upon this

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question of the other distinguished jurists who have filled the office of attorney general. I simply refer to them. They are the opinion of Mr. Hugh S. Legare, dated October 22, 1841 (3 Opp., 673); of Mr. John Y. Mason, dated August 10, 1846 (4 Opp., 523); of Mr. Caleb Cushing, dated May 25, 1855 (7 Opp., 186); of Mr. Edward Bates, dated October 15, 1862 (10 Opp., 356); of Mr. James Speed, dated March 25, 1865 (11 Opp., 179); of Mr. Henry Stanberry, dated August 30, 1866 (12 Opp., 32), and of Mr. Wm. M. Evarts, dated August 17, 1868 (12 Opp., 449).

I also refer to the well considered and conclusive opinion of the present attorney general, Mr. Devens, in this case. 14 Opp., 538.

These opinions exhaust all that can be said on the subject. They were rendered upon the call of the executive department, and under the obligation of the oath of office, and are entitled to the highest consideration.

In his opinion Mr. Bates says that the power to fill vacancies which occur during the recess has been sanctioned, so far as he knows and believes, by the unbroken acquiescence of the senate; it is true that individual members of the senate have disputed the power, but not the senate itself.

Congress has recognized the power by section 2 of the act of February 9, 1863 (Revised Statutes, sec. 1761), which declares: "No money shall be paid from the treasury as salary to any person appointed during the recess of the senate to fill a vacancy in any existing office, if the vacancy existed while the senate was in session and was by law required to be filled by and with the advice and consent of the senate, until such appointee has been confirmed by the senate."

The only authority relied on to support the other view is the case decided by the late Judge Cadwallader, the learned and able United States district judge for the eastern district of Pennsylvania.

It is no disparagement to Judge Cadwallader to say that his opinion, unsupported by any other, ought not to be held

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to outweigh the authority of the great names which are cited in support of the opposite view, and of the practice of the executive department for nearly sixty years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress.

I therefore shall hold that the president had constitutional power to make the appointment of Bigby, notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session.

The point, however, most strenuously urged in behalf of Farrow is that the circuit justice, having appointed him to fill the vacancy occasioned by the expiration of his own term of office, there was no vacancy to fill, and the president could not, therefore, appoint Bigby to fill a vacancy which did not exist.

This contention brings up for consideration the proper construction of section 793, United States Revised Statutes. That section provides: "In case of a vacancy in the office of district attorney or marshal within any circuit, the circuit justice of such circuit may fill the same, and the person appointed by him shall serve until an appointment is made by the president, and no longer."

The result of this contention is that an appointment made by the circuit justice takes away the power of the president to appoint. In other words, that the power conferred by this section on the circuit justice is precisely the same in all respects as that conferred on the president by the third clause of section 2, article II, of the constitution, and section 1769, United States Revised Statutes, *supra*. That is to say, that congress has given the president and the circuit justice the power to fill the same office at the same time, and that the appointee holds for the same length of time under the appointment of either; that whether the appointment is to be made by the president or the circuit justice depends on which is the swifter to act; that the power to appoint depends on the result of a scramble between the president of the United States and a justice of the supreme court.

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Such, it seems to me, could not have been the purpose of congress in enacting section 793.

A glance at the section shows its object. It was not to enable the circuit justice to oust the power of the president to appoint, but to authorize him to fill the vacancy until the president should act, and no longer. The section expressly declares the term for which the appointee of the circuit justice shall serve, namely, until an appointment is made by the president. As soon as such appointment is made his term under the appointment of the circuit justice ends, and there is a vacancy in the office, which is simultaneously filled by the appointment which creates it. To say that the power given the circuit justice to fill a vacancy until the president appoints precludes the president from making any appointment, is, it seems to me, a very unwarranted construction of the statute.

The meaning is clear. No paraphrase can make it clearer. The circuit justice may fill the vacancy, and his appointee holds under him until the president appoints the same or some other person. The term under the circuit justice then ceases, and the appointee holds from that time on under the appointment of the president.

My conclusion is, therefore, that, upon the agreed facts, the term of Farrow under the appointment of the circuit justice ended as soon as the president appointed Bigby and he was duly qualified, and that Bigby is entitled to the possession of the office.

SEPTEMBER TERM, 1880.

ROYALL B. HICKS AND SARAH JANE HICKS, HIS WIFE, v.
ABRAHAM G. JENNINGS.

A contract in writing was made for the purchase of three different tracts of land for the gross sum of \$30,000. When the contract was carried into effect a separate deed was made for each tract, with a consideration named therein of \$10,000; one tract was paid for in full and a mortgage was given on the other two tracts to se-

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cure the balance due on them. *Held*, (1) That upon bill filed to foreclose the mortgage (on which \$5,000 remained due), the fraudulent representations of the vendor touching the value of the tract, not covered by the mortgage, could be set up by way of defense. (2) That such defense could be made against the heirs and distributees of the mortgagee.

IN EQUITY. Final hearing.

The purpose of the suit was to foreclose a mortgage executed by the defendant to one Henry Irby, deceased, dated May 7, 1877, on certain lots of land in Hall county, Georgia, known as the "Glade Mines," containing two thousand acres, to secure a note bearing the same date as the mortgage made by the defendant for the payment to Irby of \$10,000 on January 1, 1879. The note recited on its face that it was given for "part of the purchase money of the Glade mines in Hall county, Georgia."

The defendant had paid upon the note on December 31, 1878, the sum of \$5,000 principal and all the interest due up to that date. By an indorsement made on the mortgage by the payee of the note, the time for the payment of the note was extended to January 1, 1880.

The bill alleged that in January, 1878, Henry Irby, the payee of the note, assigned the note and mortgage to the complainant Royall B. Hicks, and delivered the same to the other complainant, Sarah Jane Hicks, who was his daughter, as an advancement to her out of his estate, and the same was then accepted by her as such; that on February 20, 1879, Henry Irby departed this life, and afterwards, on April 7, 1879, John F. Irby, who was a son, and C. L. Walker, who was a son-in-law, of said Henry Irby, for the purpose of carrying out the wishes of said Henry Irby in reference to said note, signed a transfer of all their interest in the same to complainant, Royall B. Hicks, and authorized him to receive the money due on the same.

The consideration of this transfer by John F. Irby and Walker was an agreement on the part of Sarah Jane Hicks to accept said note as an advancement, and account for

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the same in the final settlement of Henry Irby's estate, and the complainants Hicks and wife agreed to pay over to John F. Irby and to C. L. Walker, for his wife, Agnes Walker, \$10,000 belonging to the estate of Henry Irby, then in deposit in a bank in the city of Atlanta. Of this sum \$5,000 was actually paid on July 18, 1879.

The defense relied on is stated substantially as follows: On April 27, 1877, the defendant entered into a contract in writing with the said Henry Irby for the purchase of certain mining lands in Georgia then owned by said Irby. There were two tracts in Hall county, known respectively as the Glade mines and Chapman mines, each containing one thousand acres and lying contiguous to each other, and all designated in said contract as the Glade mines; and lot No. 133 of the 17th district, in Fulton county, Georgia. For these lands the defendant Jennings agreed to pay the sum of \$30,000, as follows: \$10,000 on the delivery of deeds; \$5,000 on July 1, 1877; \$5,000 on January 1, 1878, and the remaining \$10,000 at any time during the year 1878; and for that part of the purchase money which was unpaid a mortgage was to be given on the Glade mines.

When deeds were made by Henry Irby to Jennings for these lands in pursuance of this contract, the parties agreed that the purchase money should be divided into three parts, \$10,000 for the Glade mines, and the like sum each for the Chapman mines and for lot No. 133 in Fulton county.

Three separate deeds were made, two for the Hall county lands and one for lot 133 in Fulton county. Ten thousand dollars were paid by Jennings to Irby on the delivery of the deeds, and a mortgage given on the Hall county lands to secure the residue of the purchase money, which was evidenced by two notes for \$5,000 each and one note for \$10,000. The two \$5,000 notes were paid at or before maturity, and a payment was made on the \$10,000 note of \$5,000 and all interest up to January 1, 1879.

The defendant alleged that in the treaty for the purchase of these lands Henry Irby represented that lot 133 in Ful-

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ton county contained a valuable silver mine, and was worth \$15,000 or \$20,000, and that upon the strength of these assurances he agreed to give \$30,000, without any examination of the Fulton county lands, for the three tracts of land, estimating lot 133 as worth at least \$10,000, and believing it to be worth \$15,000, and that he would not have purchased said lot 133 in Fulton county, or the said Hall county lands, but for the statements of said Henry Irby in reference to the value of said lot 133. He declared that he relied implicitly on the representations of Irby in relation to said lot 133, and had no opportunity to examine the same. Said lot was about seventy miles distant from the place where the contract of purchase was made.

The defendant averred that all the statements of said Irby in reference to the value of lot 133 were false, and that Irby knew them to be false when he made them; that so far from it being true that said lot contained a valuable silver mine, there was not a trace of silver or other precious metal to be found upon said land, and so far from its being worth \$15,000 or \$20,000, it was not worth more than \$3 an acre, in the aggregate about \$600, and he claimed that by reason of said fraud there should be no decree for complainants on said note and mortgage.

Messrs. D. J. Hammond and W. R. Hammond, for complainants.

Messrs. J. B. Estes, Claude Estes and L. J. Gartrell, for defendant.

Woods, Circuit Judge. The evidence leaves no doubt that Henry Irby, in his treaty with Jennings for a sale of the lands mentioned in the answer of defendant, fraudulently misrepresented the value of lot 133 in Fulton county. The fact that a careful examination of the lot, and an assay of ores found upon it, show that not a trace of any precious metal exists upon it, stamps the statements made by Irby to Jennings in reference to its value with falsehood and fraud. So far from being worth \$15,000 or \$20,000 on account of

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the deposits of silver to be found on it, as asserted by Irby, it is not worth over \$500 or \$600. Irby must have known that his representation was false, for he told Jennings that he had procured an assay of the ore taken by himself from the lot to be made, and that it proved to be rich in silver.

The evidence shows that the lot 133 formed at least a third of the entire consideration given for all the lands sold by Irby to Jennings. If this suit were prosecuted by Irby, and if it were based on a note given for the purchase price of lot 133, there could be no question that the defense set up in the answer and established by the proof, showing the wilful fraud and misrepresentation of Irby, ought to prevail.

But the suit is for the foreclosure of a mortgage executed to secure a note given, as expressed on its face, for the purchase money of the Glade mines, and it is prosecuted, not by Irby, but by one of his heirs to whom he transferred the note in his life-time, and who at the time of the transfer agreed to consider it as an advancement on her share of her father's estate.

This state of facts raises two questions. (1) Can the fraud of Irby, and the failure of the consideration in the sale of lot 133, be set up as a defense to a suit to foreclose the mortgage on another tract of land executed to secure a note given for the purchase price of that other tract?

The evidence makes it clear that the purchase of the three tracts of land was one transaction. It was provided for in one instrument, and one gross sum named for all the lands which Irby agreed to convey. It is true that, in arriving at this gross sum, an estimate was put on each tract, and that when the written contract came to be carried out, three separate deeds were made for the three tracts respectively, and a consideration of \$10,000 was named in each deed. The deeds were all made, the cash instalment paid, and the mortgage executed at the same time.

Now if Irby himself were seeking to foreclose this mortgage, it is quite apparent that his fraud in selling lot 133 for \$10,000, which had been paid, might be set up as a defense

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against his recovery of the same amount as the consideration for another of the tracts sold by the same contract. In an action at law the defense might be restricted to note sued on. But not so in a court of equity, which always looks at the substance of things and seeks to do complete justice between the parties. A court of equity would not allow a decree upon the note and mortgage in suit, and then turn the defendant over to another suit to recover the amount out of which he had been wronged by the fraud and falsehood of the complainants. Having the parties before it, it would adjust the controversies between them, springing out of the same transaction, according to equity and good conscience. And this would be to refuse a decree on this note and mortgage, in consideration of the fact that the complainant had already defrauded the defendant in the same contract out of which the note and mortgage sprung to an equal or greater amount. Upon the facts of the case, therefore, if Henry Irby were the complainant, no decree should be made in his favor.

The next question is, can the defense which the defendant could have set up against the note and mortgage, if the suit to foreclose were prosecuted by Irby, be set up against his heirs and distributees?

The transfer of the note by Henry Irby in his life-time to Sarah Jane Hicks, his daughter, was not for value. It was a mere gift. The rule is, that a negotiable instrument, in order to be operative in the hands of an indorser as against equities and defenses existing between the maker and payee, must have been taken by the indorser for value; that is, he must have parted with something valuable therefor at the time of the transfer. *The Park Bank v. Watson*, 42 N. Y., 490.

Neither Sarah Jane Hicks, nor her husband, Royall B. Hicks, paid anything for the note at the time of its transfer by Henry Irby. They parted with nothing of value as a consideration for the transfer. The same defenses against the note were therefore open to the maker as if it had remained in the hands of the original payee.

The agreement made between Hicks and wife and the

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other heirs and distributees of Irby's estate, after Irby's death, did not change the terms on which Irby and wife had received the transfer of the note and mortgage. They agreed to consider them as an advancement, and that they had received them from Henry Irby as an advancement. The contract between them and the other heirs and distributees provided that in case of any recovery against the estate of Henry Irby, reducing the distributive shares of the heirs, they, the said heirs, would "refund their *pro rata* shares of such recovery to an extent sufficient to save indemnified and harmless the legatees of said estate, and make all parties interested therein equal."

A fair construction of this contract would require, in case of a failure to collect the note in suit by some of the defenses set up in the answer, that the residue of the estate should be equally divided between all the distributees, so as to give each an equal share.

In any view that may be taken, the complainants neither paid nor surrendered anything of value for the transfer of the note and mortgage. The same defense was therefore open to the maker of the note as if the suit were prosecuted by Henry Irby in person.

The defendant Jennings, after setting forth in his answer his defense to the case made by the bill, attempts, by calling his answer an answer in the nature of a cross-bill, to make the complainant Hicks, in his capacity of administrator of the estate of Henry Irby, a party to the original bill, and asks a decree against him, as such administrator, for the \$5,000 paid upon the note and mortgage on which this suit is based, with interest.

The answer in the nature of a cross-bill is authorized by the code of Georgia, sec. 4181, but no such pleading is recognized by the equity practice of the United States courts.

But if the defendant had filed a formal cross-bill, he could only make either the complainants or other defendants, if any, or both, parties defendant to his cross-bill. He could not introduce a new party and ask relief against him. By

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asking relief against Hicks as administrator of Irby, the defendant seeks to bring into the litigation a new party, and to obtain a decree against him alone. This is not permissible. The other parties to the case are not to be involved, by the filing of a cross-bill, in a controversy between one of the defendants and a stranger to the original litigation, in which they have no interest, and to which they are not necessary or proper parties.

There can therefore be no decree in favor of the defendant against Henry Irby's administrator, as prayed for in the answer.

There will be a decree dismissing the bill of complainants at their costs, and dismissing the claim of the defendant set up in his answer in the nature of a cross-bill, without prejudice to a suit upon the same by defendant against Henry Irby's administrator.

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GOANN AND OTHERS V. THE ATLANTA COTTON FACTORY.

1. A mortgage executed by the defendant company to trustees to secure a large number of bonds, provided that upon default continuing for one month in the payment of interest, the trustees, on notice thereof, should be authorized to take possession of and sell the mortgaged premises. Before default certain of the bondholders filed their bill against the company, in which they alleged that it was insolvent; that it could not pay its debts and running expenses; that consequently the factory of the company would close and the operatives disperse, and that the company was about to make default in the payment of interest. The bill prayed for the appointment of a receiver, and that upon default in the payment of interest, the mortgage might be foreclosed and the property sold. The trustees and many of the stockholders were not made parties. Before any default in the payment of interest, a decree was made by consent of the parties for the sale of the mortgaged property, and it was accordingly sold. Several persons were deterred from bid-

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ding by reason of defects in the proceedings, and the property sold for about two-thirds of its value. *Held*, (1) That, the trustees not being parties to the suit, the absent bondholders were not bound by the decree. (2) That an indefeasible title could not be derived under the sale. (3) That under the circumstances the sale and the decree should be set aside, and the trustees allowed to become parties, so that the rights of all persons interested might be finally settled.

The cause was heard upon a motion to set aside a decree of foreclosure and a sale made thereunder, and to allow the trustees of the deed of mortgage upon which the decree was based to become parties to the suit. The motion was made and heard at the same term of the court at which the decree was rendered.

Messrs. L. E. Bleckley, W. W. Webb and J. T. Davis,
for the motion.

Messrs. J. L. Hopkins, J. T. Glenn, B. F. Abbott and
W. S. Thompson, contra.

PARDEE, Circuit Justice. On August 15, 1878, the defendant company executed and delivered to Freeman Clarke, Henry B. Plant and V. R. Tommey, a deed of certain property in Atlanta, Georgia, both real and personal, in trust, for the purpose of securing to the holders of the first-mortgage bonds of said company payment of the sum of \$150,000 on October 1, 1883, together with interest thereon at the rate of ten per cent. per annum, payable quarterly, on the first days of January, April, July and October, in each year, at the City Bank, New York. It was provided in said deed that if the defendant should fail to pay the interest coupons, or any of them, or the bonds, or any of them, as they became due, and such default should continue for one month, such trustees, when notified of such failure, and that it has continued for one month, were authorized to take control of the property and to sell the same as therein provided.

On the 25th of March, 1881, the plaintiff E. T. Coann, as sole complainant, filed his bill, alleging the making of the deed of trust, that he was a holder of thirty-seven first-mort-

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gage bonds of defendant, and that he brought this action on behalf of himself and the first-mortgage bondholders who might join in the same. Coann further alleged that the defendant was insolvent, and could not pay its debts, as well as running expenses, and the wages of its employees, and that the factory would close, and the employees would scatter, and that it was about to default in the payment of interest due April 1, thereafter. He prayed for the appointment of a receiver, and that *when default occurred in the payment of the interest on the bonds* the deed might be foreclosed and the property sold to pay the first mortgage. Thereupon, by order made and entered March 25, 1881, the court appointed Hon. Rufus B. Bullock as receiver of the property, with directions to carry on the business, collect dues, and *out of the proceeds* pay operatives and other proper expenses, and further, to make report of his proceedings every rule day.

On April 21, 1881, a petition was filed by the Saco Water-power Company, and on the 30th of April, 1881, a petition was filed by the Lewiston Machine Company, asking that the petitioners be made parties complainant to the suit. Each of these petitioners reserved the right to move for another person than Rufus B. Bullock to be made receiver of the defendant's property. On September 27, 1881, a petition was filed by A. V. Clarke, Freeman Clarke, and others, asking to be made parties complainant, who united in the charges and prayers of the bill. A special allegation was as follows: "Said Freeman Clarke is one of the trustees named in the mortgage, and is the holder and owner of eighteen of said first-mortgage bonds," etc. On the same day an order was entered in conformity with the petition.

December 10, 1881, an order was entered upon the petition of the receiver, directing him to make and issue negotiable paper for such cotton and supplies as he may find necessary to purchase in carrying on business, . . . and for money to make such purchases. Final decree was entered in the action March 28, 1882, under which a sale was made by the commissioners therein named on the 6th of July, 1882, and

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Lemuel Coffin purchased the trust estate for \$101,000, that being the highest sum bid for the property.

By reference to the decree it will be noticed that the trustees, the holders of the legal title of the property, were not made parties to the foreclosure suit, and that only \$122,000 of the first-mortgage bondholders appear on the record. By the affidavits of the two surviving trustees it appears that not only were they not made parties, but they were never requested to take any steps looking to a foreclosure of the property, nor were they ever notified that there was default in the payment of the interest coupons, nor that the interest had remained unpaid for the period of one month.

Freeman Clarke's affidavit shows that he understood the pending proceedings were being carried on, not for the purpose of foreclosure, but for the sole purpose of appointing and continuing Mr. Bullock as receiver. Messrs. Freeman Clarke, E. T. Coann and A. V. Clarke say they did not know, until after the decree was entered, that a foreclosure suit was in progress. The interest on their first-mortgage bonds was paid up to the 1st of April, 1882, and the decree herein was entered on the 28th day of March, 1882, prior to any default upon their large amount of coupons.

No proof appears to have been taken in the cause, and the decree was entered by consent on the 28th of March, 1882. Apart from the statements in the decree, there is no evidence that any of the coupons were at that time unpaid. Mr. A. V. Clarke and others made arrangements to protect their interests at the sale, but withdrew from these arrangements on learning that the trustees had not been made parties to the foreclosure suit, and that the trustees claimed that the sale would be invalid by reason of their not having been joined as parties. Freeman Clarke refused to join in any effort to bid upon the property, and notified the other first-mortgage bondholders that, in his opinion, the sale of the property in a suit to which the trustees were not parties, would be irregular and void. This position of Mr. Freeman

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Clarke as a trustee, arising out of a failure to join the trustees as parties, created confusion and uncertainty among the bondholders, and led to the failure of many of them to act in concert for the protection of their rights.

The affidavits of the plaintiffs Coann and A. V. Clarke show that they were both ignorant of the fact that this action was a foreclosure suit until after the decree of foreclosure was granted. When they were informed of the decree of foreclosure they were advised by counsel that there was doubt about the validity of the title to the mortgaged premises, as the trustees were not made parties, and as some of the bondholders were not parties.

The affidavits of Zephaniah Clarke and C. C. Cornell show that they are holders and owners of first-mortgage bonds of the defendant, and have not been made parties to the suit, and that they knew nothing about these proceedings until after the sale herein; the interest on their bonds having been regularly paid to April 1, 1882.

Mr. Warner's affidavit is much to the same effect, showing his ignorance of a foreclosure suit until after the granting of the decree, and that he took such steps as he could to protect the interests of his clients, the brothers Landauer, who were not made parties to the suit, but that owing to the fact that the title under the sale was questionable, and that the amount of receiver's certificates were unascertained, the bondholders did not make a bid.

Mr. Webb's affidavit shows that the purchasers, at the sale of July 6th, purchased with notice of trustees' rights and claims in the matter; that a large number of the first-mortgage bondholders were not parties to the proceedings; and that, as he is informed and believes, there was no default in the payment of the interest on the bonds.

The mortgaged premises were sold July 6, 1882, for \$101,000, to Lemuel Coffin, who is one of the firm of Coffin, Altemus & Co., which firm holds first-mortgage bonds to a large extent, and are complainants in suit, and also own the entire issue of \$100,000 of second mortgage bonds.

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W. E. McCoy values the mortgaged property at \$200,000; William C. Langley values it at at least \$150,000.

The case comes up at this time as a motion by Freeman Clarke and Henry B. Plant, surviving trustees, made at the term of court at which the decree of sale was rendered, asking that the sale made be set aside for inadequate price, and that the consent decree rendered be vacated to allow them, as representing all the first-mortgage bondholders, to be made parties to allege and prove default in the payment of the interest due on the bonds, and to obtain a decree of foreclosure that will bind and protect all the parties interested in the first-mortgage bonds or the trust estate. A consideration of the entire case satisfies me that this motion should be granted. To reach this conclusion it is not necessary to determine that the proceedings had in the case have been irregular and void.

It may well be that all the persons who have made themselves parties, or who have come in since the sale asking for payment of their bonds, are bound by the decree. And yet it may be said that a close inspection of the pleadings and proceedings had in the case shows that the original bill, giving it its fullest scope, is not one for foreclosure; that it shows no grounds looking to a foreclosure, except the allegation that the mortgagor is going to default; that in only one application of a bondholder to be allowed to join the complainant is there any allegation that there had been default in paying the interest; that only the original bill was notice to the defendant who made no appearance; that the decree *pro confesso* entered against the defendant goes only to the allegations of the original bill; and that there is no proof in the case by confession or otherwise, except affidavit offered on this hearing, that there had been any default or breach of contract that would warrant a decree of foreclosure. Nor is it necessary to determine whether or not all the bondholders, or else the trustees to represent them, must be made parties in order to obtain a valid foreclosure of a trust deed. The law of Georgia which controls the effect of the trust

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deed which is the foundation of this case, to the effect that "a mortgage is only security for a debt, and passes no title," may well make it a vexed question in this state as to how far it may be necessary for trustees of a trust mortgage to be made parties in the foreclosure of the mortgage granted by the trust deed. It is clear that the bondholders who have not been made parties are not bound by the decree.

The equity rules that allow suits to be brought by some complainants for the benefit of all expressly reserve the rights of the absent parties. See Equity Rules 47 and 48. The absent bondholders are not *quasi* parties, as they would have been had the trustees been made parties to the suit. See *Campbell v. Railroad Co.*, 1 Woods, 368. It follows that, as the absent bondholders are not bound by the decree, they may inaugurate new proceedings, involving a foreclosure and a review of what has been done. The parties who have joined in this case, but who now insist that the trustees shall be joined, are also in a position to keep the case before the court. The purchaser at the sale made, who is also a bondholder and party, takes no full title to what the decree purports to sell. The remedy, then, given by the decree in this case, is not full and complete, even as to the parties before the court, and the litigation is not ended.

The proposition is to open the case (the proceedings still being *in fieri*) to allow proper parties to be made, so as to grant full relief and settle the rights of all parties interested. It also seems clear, from the evidence, that the apprehensions of some of the bondholders, and their proceedings at the sale, have thrown such a cloud upon the title to be given under the decree rendered as to justify the finding that the price offered at the sale is inadequate. The affidavits filed go to this extent. On this point nothing is left, then, for the court to do but refuse to confirm the sale and set the same aside. That being done, there are no good reasons against, and many good reasons in favor of, vacating the decree to allow new parties to be made, a proper case proved, and a new decree to be rendered that will do full equity to all par-

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ties and end the litigation in the premises. No damage can result but by delay, and no great delay can result, as a new decree can be rendered at this term, and the property at once offered for sale. In vacating the decree and allowing new parties to be made, the court can and will make such terms as will result in speeding the cause and procuring a speedy sale of the property.

WINSTEAD V. BINGHAM.

1. According to the jurisprudence of Georgia, the transfer by delivery of a note payable to bearer carries with it the mortgage lien, so that the holder may foreclose in his own name without making the mortgagee a party.
2. Section 1996 of the code of Georgia does not apply to mortgages.

IN EQUITY. Heard upon pleadings and evidence for final decree.

Mr. J. D. Cunningham, for complainant.

Messrs. J. S. Bigby and B. H. Bighous, for defendant.

PARDEE, Circuit Judge. The bill in this case is for the foreclosure of a mortgage given by defendant to one Freeman, executor, to secure the payment of a note of even date therewith, payable to bearer. The hearing is on the merits, and the proof consists of the notes in question, produced by complainant, and the mortgage duly executed as set forth in the bill. Neither note or mortgage show any assignment in writing, and the question for decision is whether, in such a case, under the law of Georgia, the bearer of the note takes any title sufficient to foreclose the mortgage in his own name.

At common law and in equity it is well settled that the incidents follow the principal, and that the transfer of a note secured by a mortgage carries with it the mortgage security; so that the transfer by delivery of a note payable

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to bearer will transfer the mortgage given to secure the note. And the law of Georgia is the same, unless there has been a change made by some statute of the state. See *Wellborn v. Williams*, 9 Ga., 86; *Roberts v. Mansfield*, 32 Ga., 228.

The statute claimed to have made this innovation is the act of 1873. Sess. Acts 1873, pp. 42 to 47. Section 21, the last of the act, is to the effect that "all liens herein provided for may be assigned by writing and not otherwise, and under such assignment the assignee shall have all the rights of the assignor as regulated by this act." An examination of the entire act shows that the first section declares certain liens to be established, among which is the lien by mortgage. The second section provides for the superiority of liens for taxes,—first for the state, secondly for counties, and thirdly for municipalities. The third section is to the effect that certain liens, to wit, in favor of judgment creditors, of mortgage creditors, and in favor of the state for costs, shall remain as under existing laws, except when altered by the subsequent provisions of the act. The remaining and subsequent sections relate in no manner to provisions for the mortgage lien, and in no way alter the mortgage lien. No adjudicated cases from the supreme court of Georgia are cited where the last section of the act in question, or section 1996 of the code to the same purport, have been construed so as to cover assignments of mortgages.

The case of *The Dalton City Co. v. Johnson*, 57 Ga., 398, cited by counsel for defendant, throws no light on the question; the notes sued on contained no negotiable words, and there was no assignment proved in writing or otherwise.

The case of *Turk v. Cook*, 63 Ga., 681, referred to, is not in point. That was a suit brought on an open account, without an assignment in writing.

The case of *Planters' Bank v. Prater*, 64 Ga., 609, cited, would cover the case, had the question under consideration been before the court. That was a suit brought on an absolute conveyance of real estate, with a bond to reconvey on the payment of certain notes payable to order, which notes

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were not indorsed, but were transferred by delivery. Jackson, Justice, in giving the opinion of the court, says:

"It will be remarked that the note itself was only transferred by delivery to the bank, though payable to the order of Matthews & Co., and therefore that the question *does not arise* whether the transfer of the legal title to the note carried with it in equity the conveyance of the land as a security. It might well be doubted that if it had been indorsed it would carry an absolute deed to the land, such as this transaction is made by our statute, over to the indorsee. Code, §§ 1969, 1970."

The learned justice then proceeds:

"And even if the transaction made a mortgage, it would seem that under the act of 1873 (Acts 1873, pp. 42-47; Code, § 1996) the assignment must be made in writing to be valid, inasmuch as the twenty-first section of that act declares 'that all liens herein provided for may be assigned by writing and not otherwise;' and mortgages are provided for in that act."

This is clearly an *obiter dictum*, and not sound as a conclusion of abstract law. The words "herein provided for" and "herein referred to" are not the same in meaning, and yet Judge Jackson's *dictum* would make them so. From inquiry of my brethren more familiar than myself with Georgia practice, I am informed that it is not considered at the bar that the act referred to as section 1996 of the code applies to mortgages.

It seems to me to be clear that the terms of the third section expressly exclude mortgages from the effects of the act. It in effect declares that the first two sections shall not affect mortgages, which are to remain as under existing laws. The remaining sections of the act do not provide for mortgage liens. In fact, taking the act as a whole, it is difficult to see how it in any way provides for mortgage liens. These liens existed before, and unless the last section affects them, nothing has been added and nothing taken away. Every other lien referred to in the act is a statutory lien, and may be said to have been provided for by the act; and the reason

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for including mortgages in the restriction placed on assignments of liens provided for in the act fails. Every other lien referred to therein results from operation of law, and is likely to be secret and unrecorded, while the mortgage lien is part and parcel of the contract. It is evidenced usually in writing; it is registered; the world has notice of its existence, and that it exists for the purpose of securing the particular debt. The mortgage is given with a view to its assignability; it is part of the contract that it shall be assignable. See *Wellborn v. Williams, supra*. It is not so with statutory liens or privileges, for with regard to the lien or its assignability the parties usually make no contract whatever.

My conclusion is, that with regard to the assignment of mortgage liens the law of Georgia does not differ from the general rules of law and equity, and that, therefore, in this state a transfer by delivery of a promissory note payable to bearer, and secured by mortgage, carries with it the mortgage lien, so that the holder of the note may foreclose the mortgage by suit in equity in his own name, and without making the named mortgagee a party. A decree will therefore go for the complainant in this case.

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THE STATE OF GEORGIA v. A. W. PORT ET ALS.

1. Section 648 of the Revised Statutes authorizes the removal to a United States court of any criminal prosecution commenced in a state court against any officer acting by authority of the revenue laws of the United States. *Held*, that a prosecution may be considered as commenced, within the meaning of the statute, when a warrant is issued by a competent judicial officer, upon cause shown by affidavit, and the party charged has been arrested and is in custody.
2. Under the constitution and laws of Georgia, a justice of the peace, when acting in his judicial capacity, is a court.

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Petition for removal of criminal prosecution.

On the 2d day of July, 1880, an affidavit was made by Mary E. Jones before John B. Suttles, Jr., a justice of the peace of Campbell county, Georgia, charging that on June 24th, at said county, the defendant, A. W. Port, and twelve others, did commit the offense of murder upon the person of William A. Jones. The affiant declared also that her affidavit was made that a warrant might issue for the arrest of the accused persons.

Thereupon the justice issued a warrant for the arrest of the parties charged in the affidavit, directed to any sheriff, deputy sheriff, coroner, constable or marshal of the state of Georgia.

The warrant came to the hands of H. L. Collier, deputy sheriff of Fulton county, Georgia, within whose limits the accused resided. On July 7th, Collier arrested and took into custody Port and nine others of the accused, and made a return to that effect upon the warrant on July 13th, and before they had been taken before the justice of the peace who issued the warrant against them.

Port and the other parties arrested, being in custody of the sheriff of Fulton county, filed their petitions under oath in the United States circuit court for the northern district of Georgia, of which Campbell county forms a part, in which they alleged the making of the affidavit, the issuing of the warrant, and their arrest thereunder, as above set forth, and prayed for the removal to the said court of the prosecution which they alleged had been commenced against them. Their petition stated the grounds on which the removal was asked, as follows:

“At the time the alleged killing occurred, they, and all of them, were officers appointed under and acting by authority of the internal revenue laws of the United States; that they were ‘deputy collectors’ of internal revenue in and for the second collection district of Georgia, which said collection district includes said county of Campbell, and that each of the petitioners were then and there acting under color of said office and of said internal revenue laws, and that the act for the al-

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leged commission of which said affidavit was made, and said warrant of arrest was issued, was done, if done at all, in their own necessary self-defense, and while engaged in the discharge of their duties as deputy collectors of internal revenue as aforesaid, and while acting under authority of said internal revenue laws of the United States as aforesaid; that what they did was done under, and by right of, their said office; that it was their duty to seize illicit distilleries, and the apparatus used for the unlawful distillation of spirits, and that while attempting to seize such distilleries, as aforesaid, in said collection district, and in said northern district of Georgia, and having engaged in such attempt to seize said distilleries, under and by authority of the revenue laws of the United States, as such deputy collectors aforesaid, they were assaulted and fired upon with guns and other deadly weapons by a number of armed men, and that in defense of their own lives they returned the fire of their assailants, which is the alleged murder mentioned in said affidavit and warrant of arrest; and petitioners aver and say that said criminal prosecution was commenced against them in said state court for alleged acts which were done, if done at all, as officers appointed under and acting by authority of the internal revenue laws of the United States, and against them as officers acting under and by authority of officers appointed under and acting by authority of the internal revenue laws of the United States, and on account of acts done under color of their said office, and under color of the internal revenue laws of the United States, and on account of the right, title and authority claimed by petitioners under the internal revenue laws of the United States."

Upon this petition for removal, the case came on for hearing before the United States circuit court for the northern district of Georgia, which was in session.

Messrs. S. A. Darnell, Assistant United States Attorney, *John L. Hopkins*, *John S. Bigby* and *George S. Thomas*, for the petitioners.

Mr. S. B. Spencer, contra.

Woods, Circuit Judge. It is conceded that the petition for removal contains all the averments necessary to be made under section 643 of the United States Revised Statutes for the removal of a criminal prosecution from a state to the federal courts.

Heretofore the constitutionality of the act under which this removal is sought has been vigorously assailed in this court. That question, however, has been definitely settled in favor of its constitutionality by the recent decision of the supreme court of the United States in the case of *Tennessee v. Davis*, 100 U. S., 257.

The question which has been mainly discussed by counsel is, whether, under the facts of this case, it can be held that a criminal prosecution against the accused has been commenced in a court of the state within the meaning of section 643 of the Revised Statutes of the United States.

Leaving out that portion of the section which does not apply to this case, it reads as follows: "When any . . . criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under such law; . . . the said prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to such circuit court."

Upon the filing of the petition, setting out the facts, and verified and certified, as required by the law: "The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in said court." . . . "When the suit is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, the clerk shall issue a writ of *habeas*

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corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal of the district, . . . and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution upon the delivery of such process . . . shall be held to be removed to the circuit court, and any further proceedings, trial or judgment therein in the state court shall be void."

The first question for decision under this statute is, has a criminal prosecution been commenced against these defendants? It is insisted by counsel for the state of Georgia that a criminal prosecution cannot be considered as commenced until an indictment is found. I have been able to discover no solid ground for this contention. An affidavit, charging the defendants with the crime of murder, has been made and filed by a competent person before a judicial officer competent to act. The law makes it his duty to consider the affidavit, and to determine whether its averments make it incumbent on him to issue a warrant for the arrest of the parties accused. He has performed that duty, and decided judicially that a warrant should issue. He has accordingly issued his warrant and directed it to the proper officers, requiring them to arrest the parties named therein. This warrant has come to the hands of the sheriff of Fulton county, who, in obedience to its mandate, has arrested and taken into custody, and for six days has held in custody and deprived of their liberty, these defendants. To say to them, when they apply for the removal of this prosecution, that their petition must be denied because no prosecution has been commenced against them, the court must shut its eyes to the conceded facts in the case. It would be hard to convince a man who was taken away from his business and family, and held in custody by a sheriff on a lawful warrant for his arrest, duly issued by a judicial officer upon an affidavit duly made before him, charging him with an offense against the criminal laws of the state, that no criminal prosecution had been commenced against him.

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There is nothing in the words of section 643, nor in its purpose, to warrant such an idea. Its object is to take from the state courts jurisdiction of all cases that fall within its terms as soon as they are commenced.

Now, when is a criminal prosecution commenced? Obviously, as soon as the warrant is issued. It has been so held in the case of *Queen v. Brooks and Gibson*, 1 Den., 217 (5 British Crown Cases, 222). This was an indictment upon 9th Geo. 4, c. 69. By the 4th section of the statute it was declared: "The prosecution for every offense punishable by indictment by virtue of that act shall be commenced within twelve calendar months after the commission of the offense."

The offense was committed December 4, 1845. The information before justices and warrant were on December 19, 1845. Brooks was apprehended September 5, 1846, and Gibson October 21, 1846. The indictment was preferred April 5, 1848. The question was reserved for the opinion of the judges whether the prosecution was commenced in time. They all concurred in holding that the prosecution was commenced within twelve calendar months after the commission of the offense. To the same effect, see 1 East, P. C., 186; and *Rex v. Phillips*, 1 British Crown Cases (Russ. & Ry.), 369.

The difficulties and embarrassments which would arise in this court in the future progress of the case, if it should now be removed, have been urged by counsel for the state of Georgia as an argument against the view above taken. The same argument has been before used in this court against the removal of a criminal prosecution from a state court to this court after indictment found. It was urged that the statute did not authorize such removal on account of the difficulties and incongruities which would arise in a trial in this court of an offense against the laws of the state. That argument did not prevail, and an indictment for murder, removed from the state courts, was tried in this court. *Georgia v. O'Grady*, 3 Woods, 496.

No insuperable difficulties were encountered in the case,

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and none, it is fair to presume, will be in this. No reason is perceived why an indictment for an offense against the laws of Georgia may not be found by a grand jury of this court in the case of a prosecution removed from the state court. The difficulties in the way of such an indictment, and the subsequent trial of it, are in my judgment imaginary.

But if they were real, it would be no answer to the petitions for removal. In the case of the *State of Tennessee v. Davis, ubi supra*, the supreme court says: "Whether there is any mode and manner of procedure in the trial prescribed by the act of congress is totally immaterial to the inquiry whether the case is removable; and this question could hardly have arisen upon a motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a state, if they were real, would be for the consideration of congress. But they are unreal."

All this applies to proceedings in criminal cases so removed, no matter at what stage of the prosecution the removal may be made.

My conclusion is, therefore, that when this petition for removal was filed on July 13th, a criminal prosecution had been commenced against the defendants.

But it is insisted that if there was a criminal prosecution commenced, it was not commenced in a court of the state. The contention is that the proceedings of John B. Suttles, Jr., justice of the peace, in taking the affidavit of Mary E. Jones and filing it, and issuing his warrant of arrest thereon, were not proceedings in a court.

It is obvious that if a criminal prosecution had been commenced at all, it must necessarily have been commenced in a court.

The constitution of Georgia, art. VI, sec. 1, declares: "The judicial powers of this state shall be vested in a supreme court, superior courts, courts of ordinary, and justices of the peace, etc."

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A justice of the peace is, therefore, an officer clothed with judicial powers, and, when acting in his judicial capacity, within his jurisdiction, he is, to all intents and purposes, a court.

In receiving the affidavit of Mary E. Jones, and deciding that it sufficiently charged a crime against the laws of the state and authorizing the issuance of a warrant, he acted judicially. His proceedings in the matter were the proceedings of a court having jurisdiction to do everything that was done.

By the code of Georgia, a justice of the peace, while sitting as a committing magistrate, is recognized as a court. Section 4730 declares: "Any judge . . . a justice of the peace may hold a court of inquiry to examine into any accusation against any person legally arrested and brought before him."

This prosecution had progressed so far, before the filing of the petition for removal, that the very next step would have been the holding of a court of inquiry by the justice of the peace. The prosecution was pending before him for that very purpose, and no other. At this stage of the case the petition was interposed, and this court invoked to take the next judicial step in the prosecution. Does the claim, that there was no court in which the prosecution was pending, stand on any solid ground? In my judgment, it does not.

My conclusion is, therefore, that when this petition was filed it asked for the removal of a criminal prosecution which had been commenced against the petitioners in a court of the state of Georgia, and, as the petition sets out all the other facts necessary, under section 643 of the Revised Statutes, to justify a removal of a criminal prosecution from a state to a federal court, the prayer of the petitioners should be granted, and it is so ordered.

Folsom v. The Continental Bank.

SEPTEMBER TERM, 1882.

FOLSOM v. CONTINENTAL NATIONAL BANK OF NEW YORK.

Where two defendants, citizens of different states, were sued in a state court upon a joint bond by a plaintiff who was a citizen of the same state with one of the defendants, *held*, that the other defendant could not remove the cause to a United States court by averring that there was no controversy in the case between him and the plaintiff.

Heard on motion to remand to state court.

Messrs. E. N. Boyles and Reuben Arnold, for the motion.

Messrs. P. L. Mynatt and C. A. Howell, *contra*.

McCAY, District Judge. The Continental National Bank of New York sued out an attachment in the state courts against Folsom, and gave Wallace as security on the attachment bond.

This is a suit brought on the bond by Folsom against the bank and Wallace in the state court. The bank, as a citizen of the state of New York, filed a petition for the removal of the cause to this court, setting up that in the cause there was no controversy whatever between it and Folsom; that Wallace, a citizen of Georgia, was merely a nominal party, and that Folsom was a citizen of Georgia. The court refused to pass the order for removal. The petitioner, nevertheless, filed papers in this court, and now Folsom moves to remand the cause to the state court. The latest case on this subject that has been reported is *Hyde v. Ruble*, 104 U. S., 407.

That was a suit on what was alleged to be a partnership contract of bailment. Certain of the alleged partners were citizens of another state, not only from plaintiff, but from Ruble, the resident defendant, and they had filed a plea that they were not partners, and that the contract had been performed. They moved the removal of the cause. The court (the chief justice delivering the opinion) decided that the

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second clause of section 639 of the Revised Statutes is repealed by the act of 1875. The court further decided that under the second clause of the second section of the act of 1875, to make the controversy removable in a case where all the parties on one side were not citizens of a different state from the parties on the other side, there must exist in the suit a distinct and separate cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.

This is a suit on a bond — a joint bond. The plaintiff claims a right to sue all the obligors on the bond. He has a perfect right to do this; this is his cause of action. It is not against the bank nor Wallace, but it is against both. Even if the bond were several as well as joint, the plaintiff would have a right to treat it and sue on it as a joint bond. And this he has done. The case of *Hyde v. Ruble, supra*, is much stronger than this. There, on this question of partnership, the controversy might be fairly said to be a separable one, but the court refused the petition for removal because the plaintiff's complaint in the cause of action was joint. Here there is no separate obligation to the plaintiff. The parties are bound jointly or not at all. What would be a good defense for one would be good for the other. What would charge one would equally charge the other.

Under the ruling in the case I have referred to I feel compelled to remand the cause. Let an order be drawn accordingly.

Morgan v. East Tennessee & Virginia R. R. Co.

MARCH TERM, 1883.

MORGAN & GRAHAM v. THE EAST TENNESSEE & VIRGINIA
RAILROAD COMPANY.

An act of the legislature of Georgia which provided that a certain railroad company of that state should have power to sell its road within the state of Georgia to any railroad company of another state which might, by the laws thereof, be authorized to purchase the same, and that such company so buying should have all the rights and privileges of the said company so selling, does not, on the purchase of said railroad by such railroad company of another state, make the latter a corporation of the state of Georgia.

Heard upon motion to remand to the state court.

Messrs. W. H. Dabney and R. T. Fouché, for the motion.

Mr. J. W. H. Underwood, contra.

McCAY, District Judge. This was a suit commenced in the superior court of Floyd county, Georgia, against the Virginia & East Tennessee Railroad Company, and upon the petition of the defendant, claiming that it was a corporation of the state of Tennessee, had been removed to this court for trial.

Plaintiff now moves to remand the case on the ground that the defendant, though a corporation of Tennessee, is also a corporation of Georgia, and that this court has no jurisdiction of the controversy, since the parties are all citizens of Georgia. The question turns upon the following facts: The defendant was incorporated by the legislature of Tennessee with authority to build and operate a railroad from Cleveland, Tennessee, to the Georgia line, and to extend its road to Dalton, Georgia, by consent of the Georgia authorities.

By various acts of the legislature of Georgia this privilege was granted and the road built, but no expressed corporate rights in Georgia were by these acts conferred. The company got the right to extend and operate its road to Dalton

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on certain conditions, and, so far as this extension of the original road to Dalton is concerned, the right of the company has always been so treated. In 1874 or 1875 a railroad extending from Dalton, Georgia, to Selma, Alabama, known as the "Selma, Rome & Dalton Railroad," was sold under due process of law for the benefit of its creditors, and was bought by certain persons who afterwards, so far as that portion of the road lying in Georgia is concerned, were incorporated under the name of the "Southern Railroad Company of Georgia."

One of the provisions of this charter was as follows:

Section 6. "That the said company shall have power to lease or sell their property within the state of Georgia to any other railroad company within the state of Georgia, and also to such railroad companies of other states as, by the laws of such state, may be so authorized, and upon such terms as may be agreed upon by the board of directors and approved by a majority in interest of the stockholders of this company. And the said company so leasing or buying shall have and possess all the rights and privileges of this company."

Under this section of the charter the company sold that part of the Selma, Rome & Dalton Railroad lying in Georgia to the East Tennessee & Virginia Railroad Company, which has been and now is in possession of, and engaged in operating said road. It may be added in explanation of the situation, that this road from Dalton through Rome to the Alabama and Georgia line is in direct extension of the original road of the East Tennessee & Virginia Railroad Company from Cleveland to Dalton.

It is contended by the counsel for plaintiffs, that, under these circumstances, the defendant is a Georgia corporation, and has, therefore, no right to remove the suit to this court. It is admitted that, under the laws of Tennessee, the East Tennessee & Virginia Railroad Company was authorized to make the purchase of this road, so that at last the question depends upon the construction to be given to the sixth sec-

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tion of the act incorporating the Southern Railroad of Georgia and giving it special power to sell its property, and declaring that the purchasers shall have all the rights and privileges of the Southern Railroad Company of Georgia. It is claimed that this section, not only by reason of the nature and object of it, but by its expressed terms, casts upon the East Tennessee & Virginia Railroad Company corporate rights in the state of Georgia, and that the defendant is, therefore, a citizen of Georgia, and the case not removable.

Nothing is better settled than that a grant to a corporation is to be strictly construed; that it takes nothing by any legislative act except what was expressly granted. If this be true of grants to a corporation, it would seem to be more emphatically true of the grant of corporate rights. If, therefore, by a fair construction of this sixth section of the charter of the Southern Railroad Company of Georgia, its terms are fairly covered without including in it the right of the purchasing company to be a corporation, then the corporate right is not granted.

Suppose the purchase had been by some Georgia railroad, acting under a Georgia charter, could it for a moment be contended that the Georgia company would become a new corporation? Suppose, again, this Georgia Southern Railroad Company of Georgia had only leased the East Tennessee & Virginia Railroad, its road, would the Georgia Southern cease to exist as a company and the East Tennessee have its chartered rights? The words used in this section are to be taken altogether. The Southern Railroad Company of Georgia is authorized to sell or lease its property, not its corporate existence, and the latter words are to be construed in reference to the former. The purchasers are to get all the powers and privileges the old company has over its property, the thing sold, and the only thing it had a right to sell. Now the corporation of another state may, by the consent of the legislature, under a license, enjoy any kind of property or franchise without becoming a corporation. It may own land, construct railroads, carry on the business of a common

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carrier, make contracts of insurance, and do almost any conceivable legal act which the legislature may license it to do. In the numerous sales of railroads under chancery decrees nothing is sold but the property. The corporate right is not the subject of sale. Such a right, the right to be a corporation, depends upon the legislative will, and is not to be sold or mortgaged, except by legislative consent. And this distinction between the property rights of the corporation and its corporate existence is clear and well recognized by all writers on corporation law.

And this view is sustained by the highest authorities. In *Railroad Co. v. Harris*, 12 Wall., 65, the supreme court of the United States held that an act of the legislature of Virginia granting to the Baltimore & Ohio Railroad Company the same rights and privileges in Virginia as were granted it by its Maryland charter, did not make it a corporation. That it had only a license to do such acts in Virginia as it had a right to do in Maryland. And in the same case it appeared congress had granted to the Baltimore & Ohio Railroad the right to build a branch in the District of Columbia with the same rights, benefits and immunity as were provided by its Maryland charter, and the court held even this not to be a grant of corporative authority, but only a license to do in the District such acts as it might do under its charter in Maryland. The same doctrine is laid down by District Judge Key, May, 1882, in Middle Tennessee. *Callahan v. Louisville & Nashville R. Co.*, 11 Fed. Rep., 536.

This question is also, I think, essentially involved in the case of *Railroad Company v. Krootz*, 104 U. S. 5. In that case a Maryland corporation had leased and was operating a Virginia railroad under a contract, without any legislative authority from either state. The Maryland company was sued in Virginia, and undertook to remove the case to the United States circuit court. This the Virginia court refused, on the ground that as this Maryland company was exercising rights of a corporation in Virginia, it was to be treated as a Virginia corporation; and this ruling was ap-

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proved by the Virginia supreme court, and by writ of error was carried to the supreme court of the United States for review. That court said the matter stood on the same footing as if there was legislative authority for the lease, since the state had not complained, and it in terms decided that whilst the Maryland company was without doubt suable in Virginia, yet as it still was not a Virginia but a Maryland corporation, it had a right to remove its cause under the act of congress to the federal court.

The case of the *B. & O. Railroad Co. v. Cary*, 28 Ohio St., 208, is to the same effect, and I am unable to see why, on principle, a law of a state granting to a foreign corporation the right, privilege and immunity to operate a railroad makes the grantee any more a citizen of the state than does a law authorizing a foreign corporation to make other contracts or do other acts as home corporations may, or as citizens may, which is the law, express or implied, of almost all contracts in all the states of the Union, and is true by comity, even as regards foreign corporations proper, over almost all the civilized world. I am therefore of the opinion that the motion to remand must be denied, and the case stand for trial in its proper order on the docket of this court.

SOUTHERN DISTRICT OF ALABAMA.

DECEMBER TERM, 1879.

FRANCES L. BRYAN v. JOHN D. ALEXANDER.

ELIZABETH P. NABORS v. THE SAME.

1. A suit brought by a legatee against a surety on the bond of an executor is not, under the limitation law of Alabama, barred in six years from the date of a decree of the probate court merely ascertaining the amount due the legatee, but making no valid order directing its payment.
2. When legatees under a will were made defendants to a bill brought by other legatees against the executor to compel the payment of their legacies, and by the final decree such defendant legatees were authorized to file petitions in the case to propound their claims, *held*, that the statute of limitations did not begin to run against them from the date of such final decree.
3. A decree against the executor, rendered in favor of such defendant legatees on the petitions which they were permitted to file, is not a bar to an action at law against the surety on the bond of the executor to recover the amount of such decree.

ACTION AT LAW. Heard on demurrer to pleas.

Mr. Harry Pillans, for plaintiffs.

Mr. John Little Smith, for defendant.

BRUCE, District Judge. These two cases are heard together on demurrers to pleas of the statute of limitations in each case.

The substance of the bill is as follows:

The complainants are the legatees under the will of John Horn, deceased. The defendant J. D. Alexander was a surety on the bond of John A. C. Horn as executor of the last will and testament of said John Horn. On June 15, 1877, a decree was rendered in this court, sitting in equity, in favor of these plaintiffs respectively, and against John A. C. Horn as

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such executor. John A. C. Horn has never paid said decrees of this court in favor of complainants, although he has received sufficient assets of his testator's estate for that purpose. He has consequently failed in his duty as such executor, and there is a breach of said bond, and the defendant Alexander is liable as surety thereon to the complainants respectively for the amounts of said decrees, with interest and costs.

The pleas set up that on May 2, 1864, there had been a final settlement in the probate court of Marengo county, Alabama, from which the letters testamentary issued, which court had jurisdiction of the subject matter; and that afterwards, to wit, on June 2, 1871, a decree was rendered in this court in a cause in which William Lockhart and Sarah A., his wife, *et als.*, were complainants, and John A. C. Horn *et als.* were respondents, in favor of the complainants in that suit and against John A. C. Horn; that to this suit plaintiffs herein, Bryan and Nabors, were made defendants, and subsequently they, by leave of the court, filed their petition in this court in that suit, and on June 15, 1871, procured the said several decrees against J. A. C. Horn as executor.

The statute of limitations of six years in favor of sureties on bonds of executors and administrators is then set up in the different pleas.

As to the decree of 1864 in the probate court, and that of this court in 1871, and the question whether plaintiffs are barred by the lapse of more than six years since 1864, and if not, whether they are barred by the lapse of six years since the decree of the court in 1871, it will be proper to inquire what was and is the nature of the decree rendered in the probate court of Marengo county on May 2, 1864.

It appears that the probate court found that there was then a balance due to Frances L. Bryan of \$925, which the court ordered paid in the bonds of the Confederate States, in which bonds the funds had been by the executor previously invested under certain legislation authorizing that to be done.

The amount to B. O. Nabors and wife was \$1,295, which

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by the decree the executor was ordered to retain in his hands subject to the further order and decree of the court, upon the determination of a certain matter.

This decree of the probate court, in so far as it authorized and directed the payment of the amounts to the legatees by the executor John A. C. Horn, was not null and void. *Horn v. Lockhart*, 17 Wall., 570.

If, then, we eliminate from this decree the void portion of it, what have we left? We have an ascertainment of the amounts due the legatees under the will—the plaintiffs herein.

It is said the order to pay is left intact, and that it means to pay so many dollars in good and lawful money. But the order is specific to pay in Confederate bonds, and does not admit of that meaning; indeed, it repels it. So that it is clear the court ordered a void thing to be done, which renders the entire order void.

So there was nothing left but an ascertainment of the amount due to the distributees. Now, was that sufficient to start the running of the statute of limitations of six years in favor of the sureties on the bond of the executor?

The statute is in these words: Code of Alabama, 1876, sec. 3226: "*Actions to be brought in six years.* Within six years: motions and other actions against the sureties of any sheriff, coroner, constable or any public officer, or actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of the principal, the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety."

This statute has been construed by the supreme court of the state in several cases, and elaborately in the case of *Fretwell v. McLemore*, 52 Ala., 124, and in the cases therein cited.

In that case the court goes on to show that an administration or a guardianship is treated as an entirety, though it comprises many separate acts and transactions, all of which impose liability; and the condition of the bond according to

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its literal import is broken whenever the principal violates or neglects any duty the law imposes. "For such neglect or violation the surety is chargeable by virtue of the conditions of the bond, but of themselves they do not separately create a cause of action against or fix the liability of the surety." And the court then says: "Before any cause of action arises against the surety at law, and before the liability is fixed at law or in equity, there must be a judicial ascertainment of the default of the principal. . . . The judicial ascertainment creates the cause of action against the surety authorizing the enforcement of the liability imposed by the bond." Now in the light of this exposition of the statute, can this decree of the probate court of Marengo county, with the void portion of it eliminated, be held to have been a judicial ascertainment of the default of the principal upon this bond?

What is a default? It is a failure or omission to do something required. The omitted act of the principal obligor here was the failure to pay in Confederate bonds, and can a default be predicated upon an omission to do that which there is and can be no legal authority to do? True, the court found amounts to be due to the legatees, and ordered the executor to pay them — in Confederate bonds. But the default, if ascertained at all, was that payment had not been so made in Confederate bonds, which was no default at all, that portion of the decree being void.

So, as we have said, there was nothing more here than the ascertainment of the amounts due to the legatees, like the verdict of a jury as to damages, which is a different thing from the judgment of a court upon the verdict, upon which execution may issue to enforce the collection of the money if it is not paid. It is argued that this court (Justice Bradley presiding) considered these decrees as valid adjudications in favor of the legatees — plaintiffs herein. True, he speaks of them as decrees, but we must not be misled by the use of words; and while the ascertainment of an amount due from one party to another may or may not properly be

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called a decree, yet that it is a different thing from an ascertainment of a specific amount due from one party to another and ordering its payment, whether that be stated in the formal language of a recovery or an order to pay, or its equivalent language. It is argued that the Lockhart suit in this case was in its nature a suit to enforce the decree of the probate court, and to remove from it the obnoxious part which was an obstacle to its enforcement; but that is not the scope and purpose of the bill filed in that case. The prayer of the bill was as follows:

Orators pray that your honorable court, sitting as a court of chancery, will take full and entire jurisdiction of the settlement of said estate of John Horn, and proceed to distribute the same to all the persons entitled thereto under the law, as the same may be determined by the court, etc., etc. And the court did not regard the decree as final, for if so, the remedy would have been in the appellate court.

In the opinion Judge Bradley says: "I see nothing in the case to question the accuracy of the amounts found due to the complainants by the decree of May, 1864" (meaning the decree of the probate court of Marengo county), from which it would seem that these amounts found to be due to the distributees, though unquestioned as to correctness, were not unquestionable, and were treated and held by the court as no more than the basis of the calculation of amounts due to the distributees from the executor for which the decrees were subsequently rendered. In that view there was nothing in the decree of the Marengo probate court which can be held to be a judicial ascertainment of the default of the principal on the bond, and therefore it did not give a right of action on the bond as against the surety, and did not start the running of the statute of limitations as to him.

This applies to the case of Mrs. Bryan. In the case of Mrs. Nabors the executor was directed, as we have seen, to hold the amount found due to her, which repels the very idea of a default by the principal on the bond.

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But it is contended that if the statute did not commence to run from the date of the decree of the probate court of Marengo county, it nevertheless did commence to run from the date of the decree of this court in the case in equity of *Lockhart v. Horn*, rendered on June 2, 1871.

In that case the bill in equity was filed by William and Sarah Lockhart and Narcissa Lockhart, legatees and heirs of John Horn, deceased, against John A. C. Horn as executor of John Horn, deceased, and as one of his heirs and legatees, and Frances L. Bryan and husband, Elizabeth P. Nabors and husband, Mary McPhaill and husband, heirs and legatees of said John Horn, and John D. Alexander and another as sureties of J. A. C. Horn, executor.

The bill had two objects:

1st. To contest the validity of the will of John Horn, deceased, which had been admitted to probate in Marengo county September 13, 1858.

2d. To recover from John A. C. Horn the distributive share of the complainants in the estate of their father, or, in case the will was not broken, to recover from him the balance due them as legatees under the will. The court sustained the probate of the will, and decreed for the complainants against John A. C. Horn for the amount due them by settlement in May, 1864, with interest thereon; that is, to Sarah Lockhart and husband, \$1,295.78, and to Narcissa Lockhart, \$1,207; and the decree has in it this clause: "And it is further ordered and decreed that the remaining defendants be authorized to make application for such order and relief as they may be entitled to ask on the principles of this decree." This decree was rendered June 2, 1871. It ordered no money to be paid to plaintiffs in the present suits; they were defendants in that suit, and the court in the decree of June 2, 1871, just referred to, did not pass upon their rights and determine them at all; though it was perhaps clear that on the principles of that decree the defendants (plaintiffs herein) were entitled to relief, and by the decree were authorized to apply for it. They did apply for it by filing

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petitions in that suit, which were prosecuted to decrees against John A. C. Horn, rendered June 15, 1877.

In the Lockhart suit, in this court, John D. Alexander was made a party defendant, and a decree *pro confesso* was taken against him, but was never made absolute, and there was no relief decreed against him in that suit. The record does not show that he ever appeared in response to the suit, and it does not appear that the question as to his being a proper party defendant in that suit was ever raised, or whether any relief could have been had against him in favor of complainants in that suit. Certainly none was had; so that the question of his liability to suit on the bond, in so far as that suit is concerned, is an open question. If he was liable to that suit, it must have been on the ground that the decree of the probate court was a judicial ascertainment of the default of his principal, and the fact that no relief was decreed against him would rather seem to imply that he was not regarded as properly a party liable in that suit on the bond of his principal; for if so, then why did the decree not run also against him as well as his principal?

But however that may have been, the question recurs, if the statute of limitation of six years did not commence to run in favor of Alexander from May 2, 1864, the date of the decree in the probate court, what is there in the decree of this court of June 2, 1871, to start the running of the statute in his favor at that date? It decreed no money to these complainants, and therefore could not, and did not, judicially ascertain that the principal was in default. True, this court pronounced against the decree of the probate court, and declared a part of it void, but that was just as much void when entered in 1864 as when it was so pronounced by this court; and it gave no new rights to these plaintiffs, but simply authorized them to proceed to assert in some proper way any rights they might have, according to the principles of that decree. Decrees of courts declare legal rights, but cannot in any proper sense be said to give rights.

To my mind, therefore, the decree of June 2, 1871, of this

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court did not give a right of action to these plaintiffs against John D. Alexander, and that decree did not set the statute of limitations in motion.

But it is argued that the plaintiffs, by filing their petitions in the Lockhart case in this court, elected to proceed against John A. C. Horn alone, and having done so and obtained a decree against him, as they did, June 15, 1877, that they cannot now proceed against Alexander, the surety on the bond. But why not? As we have already seen, Alexander was a party defendant in the original suit, but did not answer. He was also a party to the petitions filed in that suit by these plaintiffs, and the court decreed that no recovery could be had against him upon said petitions, and the petitions were as against him dismissed, but without prejudice. So that when this court decreed that no recovery could be had against Alexander, it must be held to have been *in that suit*. The words "without prejudice" clearly indicate that the purpose was to leave the question open as to the rights of the petitioners against Alexander as surety on the bond, and that such is the legal effect, seems to me clear.

The demurrers to the pleas are sustained.

JUNE TERM, 1882.

UNITED STATES EX REL. WATSON V. PORT OF MOBILE.

1. An act of the legislature changed the name and reduced the territorial limits of a municipal corporation, changed the designation and duties of its officers, transferred its property to commissioners and a court of chancery, to be used for the settlement and payment of its debts, and placed a limit on the rate of taxation. *Held*, that the proper officers of the corporation might be compelled by *mandamus* to levy and collect a tax to pay a judgment recovered against it under its new name, on its bonds issued before such act was passed.

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2. Legislation which abrogates or limits the power of taxation granted to a municipal corporation, upon the faith of which contracts were made by it, and without which they cannot be enforced, is invalid and void.

Heard on demurrer to alternative writ of *mandamus*, and on demurrer to the return to the writ.

The case is stated in the opinion of the court.

Messrs. Gaylord B. Clark and James E. Webb, for the relator.

Messrs. John Little Smith, T. N. McCartney and Braxton Bragg, for the respondent.

PARDEE, Circuit Judge. The relator having brought suit in this court against the respondent, the corporation known as the port of Mobile, as the successor of the corporation known as the mayor, aldermen and common council of the city of Mobile, on certain bonds issued by the latter, under legislative authority, to aid in the construction of the Mobile & Great Northern Railroad Company, recovered an absolute judgment. Failing to collect his judgment by *fi. fa.*, he has sued out a *mandamus* to compel the board of police, the authorities of the port of Mobile, to assess, levy and cause to be collected a sufficient tax on the taxable property within the corporation to pay his judgment and costs. To the alternative writ the respondents have demurred on the ground that the legislation referred to in the petition does not require the defendants named, as police commissioners of Mobile, to cause to be assessed, levied and collected the taxes which the petition prays to have assessed, levied and collected. Without waiving demurrer respondents then filed a return, admitting the judgment to have been rendered as claimed, the issue of execution, and its return unsatisfied, and the contract under which the bonds were issued, but denying that the port of Mobile is the successor of the old corporation, bound for its debts and duties; that the respondents have any legal right to levy and cause to be collected the tax demanded, and averring that by the char-

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ter of the port of Mobile they are restricted in the amount and purposes of taxation; that the present territorial limits of the port of Mobile do not embrace one-half of the territory contained in the old corporation when the bonds were issued, and that relator should proceed by equity, etc. To this return the relator has demurred on several grounds, mainly for its insufficiency. The case is submitted on both demurrers. The liability of the port of Mobile for the relator's judgment is settled by the judgment; all questions in the case back of that judgment are *res adjudicata*. See *United States v. New Orleans*, 98 U. S., 381; *Wolff v. New Orleans*, 103 U. S., 358.

The judgment settles all questions as to changes of municipal territory, as to the successorship of the port of Mobile to the old corporation, and as to the full and absolute liability of the port of Mobile to pay the debt due relator, as ascertained by judgment. The judgment having been rendered in June, 1880, the legislation of the state of Alabama (passed in 1880, 1881) thereafter, restricting the powers of the police board of the port of Mobile in reference to the amount and purposes of taxation, must be disregarded, so far as it impairs the relator's remedy under his judgment. The question, then, in this case, may be reduced to this: Has the legislation of 1879 of the state of Alabama the effect of taking away the relator's contract right to have the taxing authority of the city of Mobile levy and collect a sufficient tax to pay and satisfy his bonds and interest? As I understand this case, but for that legislation his right would be indisputable (see *Gibbons v. Mobile & Great Northern Railroad Co.*, 36 Ala., 410); and it may be, as counsel for respondents argue, that the relator has the right to claim the whole legislation unconstitutional, null and void, so far as it affects relator, under both the state and federal constitution; but I do not think that the conclusions of counsel necessarily follow, *i. e.*, that the old corporation and its officers should be kept in existence for the purpose of enforcing relator's contract, and that relator, having submitted to the

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legislation so far as to recover his judgment against the new corporation as the successors of the old, is bound to the full extent of the legislation. An examination of the acts of 1879 in question, keeping in view the force and effect of the judgment aforesaid, shows that the substantial effect of the legislation, as far as relator is concerned, may be reduced to the following: The corporate name has been changed; the corporate officers are changed as to persons, title and duties; the outstanding debts and obligations, as well as all assets and property of the corporation, are put into the hands of commissioners and chancery court for liquidation and settlement, and a limitation is placed on the amount of taxation. Now, the relator may be bound to take notice of these matters, but none of them affect injuriously his contract, as the case is made up by the judgment and answer of respondents; for the judgment fixes the liability, and the answer does not show that the taxation as limited is insufficient to furnish the alimony of the city and pay relator's demands besides. I think no one will claim that if the aforesaid changes had been brought about by amendments to the old charter, as they might have been, that relator would have lost his remedy thereby. How, then, can he have lost it now? The substance of relator's contract is that the taxing authority of the corporation shall levy and collect a certain amount by taxation to meet his demands. It can be of no moment to him what particular officers shall exercise that taxing power, or what may be the particular title of the officer, or the particular name of the corporation, provided it is the same corporation or body he has contracted with. These matters are within the legislative control, and as long as relator's remedy is not affected he cannot complain. The respondents in this case have now the taxing power of the corporation bound to the relator. It would seem that they should be compelled to perform their duties under the contract.

That the alternative writ reads "to assess, levy and cause to be collected a special tax," etc., has been made the ground for considerable argument, it being claimed that

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respondents have nothing to do with the assessments of property, *i. e.*, valuation of property, for taxing purposes, and nothing to do with the collection of taxes. I do not understand the words "assess" and "levy," in the writ, to apply to the valuation of taxable property for taxing purposes, but to mean to lay a tax on the taxable property as the same is already valued for ordinary taxing purposes, no matter whether such taxation tableau is made up by the state or city authority. The charter of the city gives the respondents certain powers and control over the tax collector, such as his appointment and removal in certain cases, and the designation of his duties. "Cause to be collected," as used in the writ, evidently means that so far as respondents have control over the performance of duties by the tax collector, they shall exercise that control in favor of the collection of the tax. The case of *Ex parte Rowland*, 104 U. S., 604, goes to the extent of holding them excused when they have performed their duties under the law in the premises.

Following the line of argument on which this case has been presented, it therefore seems clear that the *mandamus* asked should be made peremptory, but it is a very grave question whether so much argument is necessary.

If we take the case of *Wolff v. New Orleans*, *supra*, it seems that the judgment rendered in favor of relator against the port of Mobile is conclusive as to all the defenses set up against the *mandamus*. When the bonds were issued upon which the judgment was recovered, the city was, by its charter, "invested with all the powers, rights, privileges and immunities incident to a municipal corporation, and necessary for the proper government of the same," and it could have provided the means by taxation for their payment when they became due. The judgment in this case fixes the *status* and liability of the "port of Mobile" as the same corporation that issued the bonds and contracted for their payment. The municipal body that created the obligations upon which judgment of the relator was recovered existing, with her organization complete, having officers for the

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assessment and collection of taxes, there are parties upon whom the court can act. The court, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by *mandamus* compel, at the instance of the parties interested, the exercise of that power as if no such legislation had ever been attempted. This reasoning ought to be conclusive against the port of Mobile, as it was against the city of New Orleans, whose charter had also been repealed and a new one with widely-different boundaries granted her, whose government and officers had been entirely changed in name and duties, and who also had been granted a limit on municipal taxation. The question raised under the authority of *Heine v. Levee Commissioners*, 19 Wall., 655, and *Barkley v. Levee Commissioners*, 93 U. S., 258, are manifestly settled by the judgment of relator, which found the responsible debtor in existence, which the court can act on. *Morgan v. Beloit*, 7 Wall., 613, was an entirely different case from this, and conflicts in no wise with any proposition advanced here.

Considering all of the foregoing reasons, judgment will be entered overruling demurrer to petition for *mandamus*, sustaining demurrer to respondent's answer, and making the *mandamus* herein peremptory, with costs.

DECEMBER TERM, 1882.

GILDERSLEEVE AND OTHERS V. GAYNOR, ASSIGNEE, AND OTHERS.

A suit in equity, brought against a bankrupt and his assignee in bankruptcy, to foreclose a mortgage executed by the bankrupt, is not barred by the limitation prescribed by section 5037 of the Revised Statutes.

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IN EQUITY. Heard on demurrer to the bill.

Messrs. G. Y. Overall and D. P. Bestor, for complainants.

Messrs. Harry Pillans and F. G. Bromberg, for defendants.

BRUCE, District Judge. This is a suit in equity for the foreclosure of a mortgage executed to the complainants by the mortgagor, Nelson W. Perry, a bankrupt, upon the property described in the bill, for the purchase money, to which Gaynor, the assignee of the bankrupt Perry, and others are made parties defendant. The bill alleges that Nelson W. Perry was adjudged a bankrupt August 20, 1878; that the defendant Gaynor was appointed assignee of the estate of the bankrupt Perry on the 5th day of December, 1878, and the bill in this case was filed on the 17th day of November, 1882. The defendants insist, by their demurrer, that this cause falls within section 5057 of the Revised Statutes of the United States, and that it cannot be maintained because more than two years had elapsed from the date of the appointment of Gaynor as the assignee of the estate and effects of the bankrupt to the commencement of this suit.

Section 5057 provides:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. . . ."

The question, then, to be determined is whether the suit, the character and purpose of which is shown by the allegations of the bill, falls within this statute; for, if so, the bar of the statute applies, and the question being properly raised by the demurrer, the demurrer would have to be sustained. The question is not whether the action at bar falls within any exception to the statute, but does it fall within the statute at all? The bar of the statute applies, not to every suit at law or in equity between an assignee in bankruptcy and another per-

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son, but to suits between an assignee in bankruptcy and a person claiming an *adverse interest* touching any property or rights of property transferable to or vested in such assignee. The assignee succeeds to the property and rights of property of the bankrupt; so that the assignee Gaynor succeeded to the property and rights of property of the bankrupt Perry, which were, under the bankrupt law, transferred to and vested in the assignee.

The assignee took no other or greater interest in the property than the bankrupt had in it at the date of his bankruptcy. He stands in the shoes of the bankrupt, and takes the property in the same plight and condition in which the bankrupt held it. *Yeatman v. Savings Institution*, 95 U. S., 764.

The title to the property had passed to the mortgagee under the mortgage, and the bankrupt had the right to redeem, to which right the assignee succeeded; that is, to the equity of redemption. He might redeem the property or sell it subject to the mortgage, or he may do neither the one nor the other; and the mortgagee may not come into the court of bankruptcy preferring to rely solely upon his security, which he has the right to do. *Wicks v. Perkins*, 1 Woods, 383.

The proposition of the defendants is that if the mortgagee does not begin his suit to foreclose his mortgage within two years from the date of the appointment of the assignee, his suit is barred under section 5057 of the Revised Statutes of the United States. The proposition is almost startling to one who has regarded the provisions of the bankrupt law as protecting rather than imperiling *bona fide* liens upon property of a bankrupt.

But to the question: Can the suit for the foreclosure of the mortgage be held to be a claim of an adverse interest touching the property or right of property transferable to and vested in the assignee? What do the words "adverse interest," as used in the statute, mean? It is too narrow to say that it applies to property only held by adverse possession, and under claim of title hostile to every other.

In *Bailey v. Glover*, 21 Wall., 342, the supreme court of the United States says:

"This is a statute of limitations; it is precisely like other statutes of limitations, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time the cause of action accrued for or against the assignee."

See, also, *Gifford v. Helms*, 98 U. S., 248.

The statute, then, applies not only to suits where there is a contest as to the right of property *in specie*, but to suits where there are adverse interests; that is, claims on the one hand which are denied on the other, the determination of which will affect the *quantum* of the bankrupt's estate and the distributive share of the creditors. To cases of this class the statute applies, the object of it being, as the courts have said, to speed the settlement of the estate of the bankrupt.

The question, then, is, does the case at bar for the foreclosure of a mortgage fall within this class? And is the suit a claim of an interest adverse to the estate of the bankrupt, which would diminish it in the hands of the assignee and thus affect the rights of the creditors? The complainants do not claim any other or greater right in the property covered by the mortgage than that granted by the mortgagor in his deed of mortgage, and the relief prayed is no other than the legal effect of the mortgage, which is the act and deed of the grantor therein.

The proposition of defendants rests upon the assumption that the mortgagee and his grantor held interests in the property covered by the mortgage adverse and hostile to each other; that there is a claim on the one hand that is denied on the other. Such may be the fact, and the mortgagor may challenge the validity of the mortgage, and contest the alleged lien upon the property, and in such a case it is apprehended that the assignee of the mortgagor in bankruptcy would be compelled to move within two years to

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make such an attack upon the mortgage to relieve the property of an unfounded claim, so that it might go into the bankruptcy and be distributed to the creditors of the bankrupt. But that is not the case here, and the defendants do not and cannot make such a question here, for the allegations of the bill make a case of a *bona fide* deed of mortgage, and, for the purpose of this demurrer, these allegations must be taken as true. The fact of the mortgage being admitted, the suit for the foreclosure of it is not the claim of an adverse interest in the property within the meaning of section 5057 of the Revised Statutes of the United States. It does not follow that because one party brings a suit *versus* another party in reference to property rights, that they necessarily bear adverse interests to property, or rights of property; for the object of the suit may be, not to contest rights of property, but to determine judicially the respective interests which such party has to the property.

The right to an equity of redemption is not inconsistent with the rights of a mortgagee under his mortgage, unless there is a disclaimer of the mortgage and an assertion of title hostile to it. *Ellsberry v. Boykin*, 65 Ala., 336, and cases there cited.

The cases cited in support of the demurrer do not sustain it, for they are not cases where the relation between the parties was that of mortgagee and the assignee in bankruptcy of the mortgagor, unless it be the case of *Phelan v. O'Brien*, 12 Fed. Rep., 428, where there had been a sale of the property covered by the deed of trust, and the suit to set the sale aside was instituted more than two years after the date of the sale. The court held the statute of two years to apply to a suit of that kind, and it is manifest that the relation between the parties, after a sale of the property, was a different relation from that the parties occupied to each other before the sale. After the sale the relation was not only one of adverse interest, but it was one, also, of adverse holding by the purchaser claiming absolute title.

The case *In re Churchman & Co.*, 5 Fed. Rep., 181, was a
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case to ascertain and establish a lien on a vessel for supplies and repairs furnished, and it was there held that the statute of two years did apply; but the point in that case seems rather to have been that the statute did not apply because it was a maritime lien that was sought to be established, against which the claim was that no statute of limitations runs. But the court held otherwise. The case, however, is not the case at bar, for it is a case to ascertain and establish a lien, not to foreclose a mortgage.

It is claimed that this court — the circuit court of the United States — has no jurisdiction of this suit if the interest of the mortgagee and the assignee is not adverse, because the language used in section 4979 of the Revised Statutes, conferring jurisdiction on the circuit courts in each district concurrent with the district courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against an assignee touching any property or rights of property transferable to or vested in such assignee, is in substance used in the section now under consideration.

Where there is a claim of such adverse interest, section 4979 gives jurisdiction to the circuit court. But admit that the section does not cover this case, does it follow that there is no jurisdiction in the circuit court of the United States to entertain a bill to foreclose a mortgage where the conditions as to citizenship and amount involved exist? I think not. The jurisdiction of the court does not depend upon section 4979 of the Revised Statutes.

The result of these views is that the demurrer must be overruled, and it is so ordered.

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JUNE TERM, 1883.

PETER OAKES V. HENRY TONSMIERRE AND JOHN CRAFT.

The sale by a person engaged in manufacturing certain goods of the right to use his name as a trade-mark, will be valid, provided the trade-mark is not used to deceive the public; and a sale of the right to use such trade-mark by the vendee to another person will not be affected by any contract between the original parties of which the second vendee had no notice.

IN EQUITY. Final hearing on the pleadings and evidence.
Messrs. Harry Pillans and E. S. Russell, for complainant.
Messrs. W. S. Lewis and Stephens Croom, for defendants.

BRUCE, District Judge. The evidence shows that Peter Oakes, complainant, and one Hiram S. Probasco, in December of the year 1865, in St. Louis, Missouri, entered into a copartnership for the manufacture and sale of candies, under the firm name of Probasco & Oakes. This firm first called their candies Excelsior candies, but as Probasco testifies, they found this name too long, hard to be remembered, and not easily spoken by children, and they changed the name to Oakes' candies, Oakes' home-made candies and Oakes' pure home-made candies.

This firm of Probasco & Oakes carried on the business of making and selling candies up to May 17, 1869, when Peter Oakes, for a valuable consideration, sold out to his partner Probasco. The bill of sale is in evidence, and to quote the language, the transfer is of "all my right, interest and estate, it being one-half, in and to the stock of candies, materials, goods, wares and merchandise, fixtures, furniture, tools and equipments of the firm of Probasco & Oakes, also the good will of the business and name of the firm of Probasco & Oakes, and the exclusive right to make and sell Oakes' candy, and to use the name thereof."

On the same date another memorandum of agreement was

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made, which is also in evidence, by which Oakes agreed to work for Probasco, and Probasco agreed to employ him for two years at wages therein specified at manufacturing home-made candies, or at any other work necessary to be done or properly appertaining to the business of candy-making, and in this memorandum it is provided that "should he, Probasco, sell out his said business of candy-making, and selling within said two years, or at any other time, then said Oakes shall be relieved from all obligations under this agreement, and the right and privilege of making and selling Oakes' candies, and of using said name, shall revert to said Oakes."

Probasco continued the business after the dissolution of the firm, and in addition to the word Oakes, or the words Oakes candies, in 1870 he devised a trade-mark of two oak trees with the word Oakes across the branches and the word candies on a plank across the trunks of the trees, and used this trade-mark or symbol in his store and upon labels placed upon packages and boxes of candies offered and sold in the market.

He continued this business and use of the trade-mark after Oakes sold out to him and after Oakes had quit his employment, which continued after the sale for eighteen months, when Oakes left Probasco's employment, by mutual consent, as he states.

In January, 1877, over seven years after the sale from Oakes to Probasco, Probasco sold out to one W. J. Hammon, for a valuable consideration, and in May, afterwards, transferred in writing, which is in evidence, "the trade-mark, name, good will and reputation connected with the manufacture, production and sale of certain candies . . . commonly known as Oakes candies."

W. J. Hammon carried on the business until the 25th of March, 1878, when he sold out to H. Skinner and N. C. Skinner, who carried on business as Skinner & Co., and who constituted Tonsmierre & Craft, the defendants herein, their agents in Mobile, Alabama, for the sale of Oakes candies made by Skinner & Co., of St. Louis, Missouri.

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Tonsmierre & Craft received candies from Skinner & Co. of St. Louis, advertised and sold them as the genuine Oakes candies, and their advertisements sometimes stated that the Oakes candies were made by Skinner & Co. of St. Louis, and sometimes not, and sometimes only stated that Tonsmierre & Craft were the agents for the sale of the genuine Oakes candies.

Complainant prays for an injunction against the defendants to restrain them from selling or offering for sale . . . any kind of candies or caramels as Oakes candies, or to use in any way the name or trade-mark of Oakes, or simulate the same in connection with the manufacturing, selling or offering for sale . . . any candies or caramels as Oakes candies, except such as may be manufactured by and purchased from Peter Oakes, and that Tonsmierre & Craft be ordered and decreed to account to Peter Oakes for all the profits which they have made . . . and all the profits which Peter Oakes could or would have made on the sales of his genuine candies and caramels, and the prayer is for general relief.

The right of the defendants to use the trade-mark in question, which combines the word or name Oakes with the two oak trees, and their right to represent and advertise themselves as the agents for the Oakes candies in the market here in Mobile, depends upon the right of Skinner & Co. of St. Louis to use this trade-mark and the name Oakes, and their right depends upon the right of W. J. Hammon, from whom they purchased it, and their right in turn depends upon the right of Hiram S. Probasco, from whom they purchased.

What right, then, had Probasco to use the trade-mark in question? either to use the name or word Oakes alone or in combination with any other mark or device in the sale of the candies made by him.

The general principle is that one man will not be permitted, by imitating the distinctive name or mark used by another person to designate articles of the latter's manufacture, to impose articles of his own manufacture on the public as the

articles of the former. The cases so holding rest upon two considerations.

1st. That it would be a fraud on the rights of the former person thus to permit his trade-mark to be imitated.

2d. That it would be a fraud on the public. *Skinner & Co. v. Oakes et al.*, 10 Mo. App., 45, and cases there cited. See, also, *McLean v. Fleming*, 96 U. S., 245.

The courts proceed upon the two-fold principle that the public have a right to know that goods which bear the signature or mark of a particular manufacturer or vendor are in fact the goods of such manufacturer or vendor, and that the manufacturer or vendor of such goods had a right to any advantage which might accrue to him from the public knowing that fact. Same authority and cases cited.

The evidence shows that Peter Oakes was a practical candy-maker. That he superintended the making of the candies of his firm during its existence, and perhaps it is only fair to infer from the testimony that he continued to do so after he sold out to his partner, and during the eighteen months after the sale that he remained in his employ. It does not appear, however, that the candies made and sold by Probasco & Oakes at their place of business in St. Louis, Mo., were called Oakes candies because the man Peter Oakes made or superintended the making of them, but it is shown by the evidence that the reason why these candies were called Oakes candies was because the name was deemed by the firm a proper one to designate their candies.

They were first called Excelsior candies, but this was a difficult name for children to speak, and Oakes was deemed the better name.

Probasco was not a practical candy-maker, yet he was the business man of the concern, and most probably had as much or more to do with building up the reputation of the candies manufactured by his firm as had his partner Peter Oakes.

The evidence on this subject I think repels the idea that the candies of this firm were called Oakes candies because Peter Oakes manufactured them, or that the use of the

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name was intended to be any guaranty to the public that Peter Oakes actually manufactured or superintended the manufacture of them.

This case, then, does not fall within the rule that one man is not permitted to use the trade-mark of another; for the use of the word Oakes was as much the device of Probasco as it was of Peter Oakes, and the more elaborate mark of the two oak trees with the words Oakes candies was the device of Probasco alone.

In the case of *Skinner & Co. v. Oakes et al.*, *supra*, it is said to be settled law that the right to use a trade-mark is not a mere personal privilege, but within certain limits it is capable of being bought and sold as other property. "A trade-mark," says Justice Strong, "like the good will of a store or manufacturing establishment, is a subject of commerce, and it has been many times held to be entitled to protection at the suit of vendors." *Fulton v. Sellers*, 4 Brewst., 42, and other authorities. See, also, *Kid v. Johnson*, 100 U. S., 617.

In the same case, however, *Skinner v. Oakes*, the court proceeds: "But when the trade-mark consists of a name, how far is it capable of assignment? is a more difficult question."

It is a name that we are dealing with here, and I cannot do better than to give the answer which the court gave in that case to the query which is propounded. The court said: "We think the answer to this question depends upon the effect which the use of the name, in each particular instance, is shown to have upon the minds of the public. If it leads the public to believe the particular goods are in fact made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are in fact made by another person, then such a use of the name will not be protected by the courts, for to do so would be to protect the perpetration of a fraud upon the people."

Tested by this rule, what is there to show that the use of the name or word Oakes by Probasco in the sale of his candies implied, or was calculated to imply, any guaranty to the public that the candies were made by Peter Oakes?

While Peter Oakes was a member of the firm it might be a reasonable inference on the part of the public that he made the candies; but after he sold out to Probasco, and after Probasco had devised and used in his business the more elaborate trade-mark of the two oak trees with the words "Oakes Candies" upon them, and this had been continued for years after Peter Oakes had ceased all connection with the business carried on by Hiram S. Probasco, how could such use of the name Oakes lead the public to believe that the goods were made by the man Peter Oakes?

On the contrary, it is but common experience that articles bearing a particular name are not regarded by the public as being the actual manufacture of the person whose name they bear. It may have been so originally, for it is only natural that the article should be associated with and called by the name of its first maker or vendor; but generally speaking, unless in cases of inventions or articles produced by special skill, which are usually protected by letters patent, the public do not in fact and are not justified in the conclusion that, because articles bear a particular name, the person of that name is in fact the manufacturer or vendor of the article. The principle contended for here by the complainant goes to the extent that Probasco, after the sale by Oakes to him, had no right to use the name of Oakes as a trade-mark, because by doing so he was perpetrating a fraud upon the public, holding out the idea that Oakes actually manufactured the candies which he, Probasco, made and sold, when such was not the fact.

But this view of the subject cannot be maintained, and was not maintained in the case of *Probasco v. Bouyon et al.*, 1 Mo. App., 241, in which case the court say: "By the dissolution of the firm, and Oakes's sale to Probasco, the latter acquired the rights of his firm to the name. Oakes could so sell his name as to deprive himself of the right to use it for his own manufacture, and give that right to another."

The court in this case holds that a trade name may be the subject of a sale — that the name of Oakes was the subject

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of a sale by Peter Oakes to Probasco; but the court could not so have held if the use of the name Oakes carried with it an assurance to the public that the man Oakes manufactured the candies, for that would have been to protect Probasco in perpetrating a fraud upon the public.

So that it is clear that Probasco's right to make and sell Oakes candies did not at all depend upon the fact that Oakes made the candies. The case falls within another principle, which is, that a name may be used as a mere adjective of description or quality, which the public do not understand as any warranty that the person whose name is used is the maker of the article; and in these cases the right to use the name may be sold with the right to manufacture and vend the goods, without reference to the question as to what person or persons actually manufacture them. But it is claimed that though Probasco had the right to carry on the business and use the trade name in question, yet he had no right to sell it, because he had agreed with Oakes in 1869, that should he, Probasco, "sell out his business within two years, or at any other time, . . . then the right and privilege of making and selling Oakes candies, and of using said name, shall revert to said Oakes."

It may well be questioned if this agreement meant anything more than that, upon a sale by Probasco of his business, that Oakes was then to have an equal right with Probasco's vendee to the use of the name Oakes in the manufacture and sale of candies; but if that admits of doubt, still can it be doubted that a subsequent purchaser for value without notice of this private agreement between the parties would acquire the right to use the trade-mark or name here in question?

Probasco was carrying on the business of manufacturing and selling candies, and advertising and designating them by a trade-mark, consisting in part of the name Oakes, and he was in the open possession and enjoyment of this trade mark.

The great mark of ownership of personal property is possession, and contracts that the title to personal property shall

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be in one party and the possession in another cannot be set up to the prejudice of a *bona fide* purchaser without notice.

In 1877 Probasco sold out to W. J. Hammon for \$4,000, and on May 17th executed in writing a transfer of the trade-mark, name, good-will and reputation connected with the manufacture, production and sale of certain candies commonly known as Oakes candies.

Here, then, was a sale of the business and trade-mark for value to one Hammon, who had the right to purchase, and who is not shown to have had any notice of the agreement between Oakes and Probasco, which was a private one, never placed upon record, and which, therefore, could not affect the rights of Hammon.

It is claimed that in August, after the sale to Hammon, notice was served upon both Skinner and Hammon of this agreement of Oakes and Probasco; but even if Skinner & Co. had notice, they would be entitled to defend themselves behind Hammon's want of notice. Sugden on Vendors, 531; *Boone v. Chiles*, 10 Peters, 177. Again, it is claimed that the case of *Skinner v. Oakes*, *supra*, shows that the complainant is entitled to recover in this suit.

True, in that case the complainants failed to maintain their bill in the court of appeals of Missouri, but an examination of the opinion shows the reason for such failure. The court says: "If we could gather from the record that the plaintiffs are the successors in business of Probasco & Oakes, that they had become the assignees, not merely of the trade-marks and tokens, but also of the establishment and the business, so that they are really carrying on the same business and manufacturing and selling the same goods as Probasco & Oakes, we would have no difficulty in holding that they are entitled to the relief which the court below awarded them." . . .

In the case at bar the evidence shows that Skinner & Co. were the successors in business of Hiram S. Probasco, who succeeded the firm of Probasco & Oakes.

Hammon testifies that he succeeded to the business,

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making no changes in the methods of manufacturing and selling the candies, and did it for a considerable time at the same shop and number in St. Louis at which Probasco had carried on the business. I see nothing unreasonable or impossible in this. If there was anything in the nature of the business of candy-making, any art or incommunicable secret known only to the man Oakes, it might be said that Skinner & Co. and Hammon, and even Hiram S. Probasco, did not carry on the same business and manufacture the same goods as did the firm of Probasco & Oakes.

But the proof shows that the quality of the candies of Probasco & Oakes consisted not only in the skill of Oakes as a candy-maker, but in the use of fine sugars, nuts and flavors; and the weight of the testimony is that the Oakes candies manufactured and sold by Skinner & Co. were quite equal, if not superior, in quality to those manufactured by Peter Oakes.

The result of these views is that Skinner & Co. had a right, derived as shown in the evidence, to the use of the trade-mark in question, and that the respondents, Tonsmierre & Craft, as their agents in Mobile, had such right, and the relief prayed against them by the complainant on account of their use of the word or name Oakes is denied.

The use, however, of the name *Peter* Oakes stands upon different principles, and it is not claimed by counsel that they had any right to use this name, but that it was used by reason of an inadvertence or mistake, was not intentional, and, in point of fact, it was used to a very limited extent.

The rule, however, is that trade-marks are protected not exclusively on the ground of fraud, but also on the ground of property. The testimony shows that Peter Oakes is making and selling candies in his own name, and designating them in the market by the name of Peter Oakes. So that if insisted upon, the case may go to a master for an account of gains and profits, on account of the unauthorized though not intentional and fraudulent use by respondents of the name of Peter Oakes.

MIDDLE DISTRICT OF ALABAMA.

MAY TERM, 1877.

IN RE A. & H. STRASSBURGER.

The United States recovered a judgment against three persons. Two of the judgment debtors had been partners, and had as such been adjudicated bankrupt. The judgment was for the individual debt of one of the partners, the two other judgment debtors being his sureties. *Held*, (1) That the United States was entitled to priority of payment out of the partnership as well as individual assets of the partners, over all creditors, whether partnership or individual. (2) That the government is not limited as to its choice of remedies or of funds liable to its claims. Therefore the assumption that the United States ought first to pursue its remedy against the surety, who was not a member of the firm, before coming on the partnership assets, was not tenable.

Heard upon petition to review a decree of the bankrupt court awarding to the United States priority in the payment of its judgment out of the bankrupt assets.

Messrs. S. F. Rice and David Clopton, for petitioner.

Messrs. Chas. E. Mayer, United States Attorney, and *D. S. Troy*, *contra*.

BRADLEY, Circuit Justice. The United States obtained a judgment for \$2,858.06 against the two bankrupts and one Warren on the 7th day of December, 1876, between the time of filing the petition against the bankrupts and the decree of bankruptcy made thereon. The judgment was on a distiller's bond, given by Herman Strassburger as principal, and Albert Strassburger and Warren as sureties. The recovery was for internal revenue taxes due, as appears by the judgment record, from Herman Strassburger on spirits distilled. The United States claims priority of payment

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over all other creditors out of the partnership assets of the bankrupts, as well as out of the individual assets of their several estates.

The bankrupt law (Rev. Stat., sec. 5121) prescribes a marshaling of assets between partnership and individual creditors. But it has been held in several cases that the bankrupt law is not binding on the United States. *United States v. Herron*, 20 Wall., 251; *United States v. Rob Roy & Cargo*, 1 Woods, 42.

The earlier act of 1797 (Rev. Stat., sec. 3466) gives to the United States priority over all other creditors in cases of the bankruptcy or insolvency of any person or persons indebted to it, and the bankrupt act recognizes this preference by making debts due to the United States the first in order to be paid out of the bankrupt's estate, after paying the fees, costs and expenses. Rev. Stat., sec. 5101.

When the United States have a claim against one member of a firm, and not against the other, its priority extends only to the interest of that member, which, as between him and his copartners, is only his share of the partnership assets after all the partnership debts are paid. The other partners have a lien on the partnership funds for this purpose; and equity gives the partnership creditors the benefit of this lien when it can do so without violating any principle of law. But where, as between the partner who owes a debt to the United States and his copartners, the latter have no such lien for the payment of the partnership debts, the priority of the United States is not barred. The government is not bound by the general equity rule for marshaling assets, nor by the rule prescribed by the bankrupt act in conformity thereto, any further than as that rule is founded in the particular case on the lien of the several parties *inter sese*. *Lewis v. United States*, 92 U. S., 618.

Now in the present case, the judgment of the United States is against both partners, Albert and Herman Strassburger, and also Warren; but it appears by the record of that judgment that it is for the individual debt of Herman

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Strassburger as principal, and that Albert Strassburger and Warren were bound as sureties. Supposing this to be so, then has Albert Strassburger, as copartner of Herman, lost his lien on the partnership assets, for the payment of the partnership debts before the payment of any of Herman's individual debts? I think he has; for the judgment is against him, as well as against Herman, and binds his interest as well as Herman's, and is superior to his partnership lien. An execution against both partners would be leviable on the *corpus* of the partnership property, and not merely on the interest of the partners after payment of the partnership debts.

Nevertheless, equity would, in ordinary cases, I think, marshal the assets, having regard to the fact that though Albert has lost his legal lien, yet he is really bound only as surety, and as such surety he has an equity to have the debt satisfied out of Herman's individual property in relief of the partnership estate. But the United States is not subject to such equities. It has a preference given by the law; and both partners being its debtors, their joint property as well as their several property is liable to the payment of this indebtedness; and the joint creditors as well as the separate creditors are postponed.

This view renders it unnecessary to examine the question of the admissibility of parol evidence to show that the distilling on which the tax arose was really carried on by the partnership.

The claim that the United States ought first to pursue its remedy against the other surety before coming upon the partnership assets of A. & H. Strassburger, is not tenable. It has been decided that the government is not limited as to its choice of remedies or funds liable to its debt. *Lewis v. United States*, 92 U. S., 618.

I think the proceeding in the case is properly by petition of review, and not by appeal. The appeal, therefore, will be dismissed; and the decree of the district court will be affirmed, so far as it gives preference to the claim of the United States over other creditors of the partnership, or of

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the individual members of the firm, but subject to the costs and expenses of the proceedings in bankruptcy.

The district court will take order, that these costs and expenses be ascertained, if necessary, and that the amount due the government be paid without delay.

MAY TERM, 1881.

LEHMAN, DURR & CO. v. THE CENTRAL RAILROAD & BANK-
ING COMPANY OF GEORGIA.

1. The fact that a shipper of cotton was allowed by a common carrier to fill up a bill of lading in his own handwriting, and leave a space which afforded opportunity for fraudulently increasing the statement of the number of bales shipped, does not make the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading.
2. In such case the forgery of the shipper and not the act of the carrier is the proximate cause of the loss.
8. The case against the liability of the carrier is strengthened by the fact that the shipper was the customer of the parties who sustained the loss, and though not their agent, was engaged in a business in which the latter were interested and was trusted by them to send forward true bills of lading.

Heard on demurrer to the complaint.

The complaint alleged that the defendant company, being a corporation created by the laws of the state of Georgia, and being a common carrier, on November 25, 1875, at Morris Station, in Georgia, did execute to one Albert Johnson a bill of lading for four bales of cotton, consigned and to be delivered to the plaintiffs at Montgomery, Alabama; and on November 30th of the same year, and at the same place, executed and delivered to said Johnson another bill of lading for one bale of cotton, likewise consigned and to be delivered to the plaintiffs at Montgomery, Alabama; that the defendant negligently per-

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mitted Johnson to make out, in his own handwriting, said bills of lading, by filling up printed forms provided for that purpose, and permitted him, in filling up the last-named bill of lading, to write the word "one," by which the number of bales was designated in said bill of lading, near the printed word "bales" in the form, and thus leave a long space to the left of the word "one," in which he could easily and, as in fact he afterwards did, fraudulently write the word "twenty," so as to make said bill of lading appear to be for twenty-one bales of cotton. And the defendant in the same manner permitted Johnson, in making out the bill of lading for the four bales, to write the word "four" near the printed word "bales" in the form, and leave a long vacant space to the left of said word "bales," so that he was enabled to, and afterwards fraudulently did, write the word "thirty" in said vacant space, immediately before the word "four," whereby he made the said bill of lading appear to be for thirty-four instead of four bales of cotton; that on November 30, 1875, Johnson, having so fraudulently raised said bills of lading, presented them to E. B. Young & Co., bankers, of Eufaula, Alabama, together with a letter written by the plaintiffs to said Johnson, dated November 25, 1875, in which they had said to said Johnson that they would honor any drafts he might draw on them with bills of lading attached, to the amount of three-fourths of the value of any shipments of cotton he might make to them. And having by means of said raised bills of lading deceived said Young & Son into the belief that he had shipped fifty-four bales of cotton to the plaintiffs, instead of five bales, the number actually shipped, Johnson induced them to discount and pay him, which they did in good faith, a draft for \$2,409.60, with said raised bills of lading attached, drawn by himself on plaintiffs, and dated November 30, 1875; that said draft was indorsed by Young & Son to C. J. Campbell, or order, for collection, and plaintiffs afterwards seeing said draft, with said raised bills of lading attached, and believing them to be genuine, did, on December 3, 1875, pay the said draft in

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full to said Campbell. And on November 30, 1875, said Johnson absconded and has not since been heard from, and has no property within the state of Alabama, known to plaintiffs. And the defendant has never carried or delivered to plaintiffs any cotton or other thing of value from said Johnson except five bales of cotton of the value of \$300, and has failed to make good to the plaintiffs their loss occasioned by its negligence, and that at the time of said transactions fifty bales of cotton were of sufficient value to discharge and pay said draft.

To this complaint the defendant demurred, on the ground that the facts therein set forth did not disclose any cause of action against it.

Messrs. David Clopton, H. A. Herbert and Chambers, for plaintiffs.

Messrs. Henry C. Semple and Thomas H. Watts, for defendant.

WOODS, Circuit Justice. The gravamen of the complaint is that the defendant so negligently performed its duty in respect to the making out of the bills of lading that it was in the power of any one to commit the fraud alleged, and fraud was committed to the damage of the plaintiffs.

The question is, does the fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for fraudulently increasing the statement of the number of bales shipped, render the common carrier liable for any loss occasioned by the forgery of the shipper in raising the bill of lading?

We think that upon the weight of reason and authority this question must be answered in the negative.

The cases most nearly resembling this are those in which a promissory note has been executed, complete upon its face, in which there are blanks left by the maker, where, after the delivery of the note, additional words, without the assent of the maker or indorser, have been inserted, increasing the amount of the note, or the rate of interest, etc. Such notes

have been held to be void in the hands of a *bona fide* holder.

The rule established by the authorities seems to be, that a note complete on its face, and not intrusted by the maker to any one for the purpose of being filled up or added to, but which is afterwards altered without the authority or assent of the maker by the insertion of additional words in blank spaces therein, the maker cannot be held to have contracted with every subsequent innocent holder who may thereby be defrauded, and is not liable to him in an action on the note in its altered form. *Greenfield Savings Bank v. Stowell*, 123 Mass., 196, and cases therein cited, among which are the following:

In *Wade v. Withington*, 1 Allen, 561, the defense that a note for \$100 had been fraudulently altered after it had been signed by inserting the words "and forty," was sustained against a *bona fide* indorser, although the alteration could not be detected on the most careful scrutiny.

So in *McGrath v. Clarke*, 56 N. Y., 34, where a blank left in a note was filled with the words "with interest," after it had been signed by the maker and indorsed by the payee, and the words were inserted without the assent of the indorser, it was held that the note was void as to the latter.

Chief Justice Church, in delivering the opinion of the court, said: "The rule that where one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, is not applicable, for the reason that the indorser did not in any legal sense enable the maker to make the alteration. He indorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to change or alter it. If it did, indorsers would occupy a perilous position."

In the case of *Worrall v. Gheen*, 39 Pa. St., 388, a printed form of a promissory note had been filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. Upon this case

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the court said: "If the sum had been left entirely blank, the inference would have been that the parties authorized the holder to act as their agent in filling it in, and they would have been bound accordingly. But where the sum is actually written, we can make no such inference from the fact that there is room to write more. This fact shows carelessness, but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder." In *Holmes v. Trumper*, 22 Mich., 427, it was held that a promissory note which consisted of a printed blank with the amount and time and place of payment filled in in writing, and which was altered without the knowledge and consent of the maker by adding after the printed words, "with interest at," at the end of the note, the words "ten per cent.," was thereby rendered void, even against an indorser, who bought it in good faith.

The court said: "The argument for the plaintiff amounts simply to this: that by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word "at" and to draw a line through a blank which followed it, and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way." But the court held the argument not to be sound, and declared that "whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should be equally protected from its alteration by forgery, in whatever mode it may be accomplished, unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him. He has quite as good a right to rest upon this presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been."

To the same effect is the case of *Knoxville National Bank v. Clarke*, 51 Iowa, 254, in which it was held that where a negotiable note for ten dollars was executed with a blank pre-

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ceding the amount, and afterwards the words "one hundred and" were fraudulently inserted before the word "ten," and there was nothing in the note to excite suspicion, and it was subsequently transferred to an innocent holder, the latter could not recover on the note.

In the case of *Wood v. Steele*, 6 Wall., 80, the suit was upon a promissory note which after its delivery had, without the assent of the maker, been altered by changing the date of its maturity. The court held that the alteration extinguished the liability of the maker, and remarked: "The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he had as little reason to anticipate the one as the other. The law regards the security after it is altered as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly."

These citations show the drift of American authority on this question, and they are not opposed by any English decisions.

In the case of *Young v. Grote*, 4 Bing., 253 (*S. C.*, 12 Moore, 484), the drawer had left with his wife checks signed by himself in blank, and the fraudulent alteration was made by his clerk, who was directed by the wife to fill out the check, and it having been found by an arbitrator that the maker had been guilty of gross negligence by causing his check to be delivered to his clerk in such a state that the latter could and did, by the mere insertion of additional words, make it appear to be his check for a larger sum, it was held by the court that he could not recover that sum from his banker who had paid it. The ground upon which the decision rests is that the check was drawn in so negligent a way as to facilitate the forgery and to exonerate the banker from liability to his customer from paying the amount; that the latter, as it were, gave authority to the party to fill up the check in the way it was filled up. But this case is clearly distinguishable from the cases of promissory notes above cited.

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1. The relation of the maker of a promissory note and the indorser is entirely different from that held by a customer to his banker. The contract of the banker with his customer is to honor the latter's checks, and if the negligence of the customer affords opportunity to the clerk or other person in his employ to add to the terms, of a check and thereby mislead the banker, the customer is held liable to the banker.

2. There was no alteration of the check after it left the hands of the drawer's agents. The alteration was made by the banker's own agents to whom he had intrusted his blank checks.

We may then take it as settled, that where the maker of a note uses a printed blank and fills in the amount for which he intends to become liable, leaving a space to the left of the amount, in which, after the note has been put in circulation, words are fraudulently inserted which increase the amount of the note, the liability of the maker upon the note is extinguished and no recovery can be had thereon against him.

This rule should apply with greater force to bills of lading, which are not negotiable commercial paper in the sense of bills of exchange or promissory notes. The conclusion is therefore inevitable, that no suit could have been maintained by the plaintiffs, the consignees, on the bills of lading mentioned in the complaint. If that be true, is there any ground for holding the defendant liable for its alleged negligence in filling up the bills of lading? Because, by the negligence charged, Johnson could the more easily commit the crime of forgery, is the defendant to be held civilly liable for the consequences of that crime? If a grantor leaves a blank in a deed, of which the grantee takes advantage by inserting words which increase the amount of land which the deed purports to convey, and thereby cheats and defrauds a subsequent grantee, is the first grantee liable for the damages sustained by the last grantee? To ask the question is to

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answer it. No one is bound to presume that the parties with whom he deals are ready to commit crime, or is bound to take precautions to prevent it.

“Is it not a rule that every one has a right to suppose that a crime will not be committed and to act on that belief.” Bramwell, L. J., in *Baxendale v. Burnett*, L. R., 3 Q. B. Div., 525.

In writing promissory notes and bills of lading and other contracts which are to pass into the hands of others, every one has a right to presume that the criminal laws of the land will protect the paper from felonious alteration, and if crime is not thus restrained, he cannot be held civilly liable for the resulting damages.

A failure to take all precautions to prevent the felonious alteration of a contract in writing is not negligence. The maker of the paper has the right to presume that no such alteration will be made.

I am therefore of opinion that the leaving of a blank space in the bill of lading filled up by Johnson does not make defendant liable for the damages resulting from Johnson's forgery.

There is another ground on which we think the demurrer ought to be sustained. Before the making of the bills of lading there were business relations between the plaintiffs and Johnson. The complaint shows that the plaintiffs had given him a letter of credit, the plain purpose of which was to enable him to buy cotton to be consigned to the plaintiffs, and the fair presumption is, that the object of the arrangement was gain to both parties. Pursuant to this understanding, Johnson bought cotton, and expecting to draw a bill on the plaintiffs for the purpose of paying for it or other cotton to be shipped to them, he delivered the cotton to defendant and took a bill of lading for it, by the terms of which it was to be delivered to the plaintiffs as consignees. He thereby transferred the title of the cotton to the plaintiffs. Now, if not the agent of the plaintiffs in this transaction, he was their business associate and customer.

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To hold the railroad company responsible to the plaintiffs for the damages resulting from a crime committed by their own customer in conducting the enterprise in which both were interested, because the company failed to suspect that the customer would commit a felony, and did not take precautions to prevent it, is to push the liability of a common carrier beyond that authorized by any adjudicated case or by reason or justice. The plaintiffs trusted to Johnson to send them fair and honest bills of lading. It was they who confided in him. If he has defrauded them they must look to him, and cannot shift the responsibility upon another party which has been guilty of neither crime nor fraud, nor of any such negligence as can be considered the cause of their loss.

Lastly. The damage sustained by plaintiffs must be attributed to the proximate and not to the remote cause. Plaintiffs' loss was the direct result of the forgery committed by Johnson. Even on the theory of the plaintiffs, the negligence of the defendant preceded the forgery by Johnson, and afforded him facilities for committing it. The plaintiffs cannot, therefore, charge their loss to the negligence of the defendant, which is the remote, and pass over the forgery of Johnson, which is its proximate cause. *Knoxville Bank v. Clarke*, 51 Iowa, 254; *Cuff v. Newark & New York R. Co.*, 35 N. J. (L. R.), 1; *Denny v. The N. Y. Central Railroad Company*, 13 Gray, 481; *Morrison v. Davis*, 20 Pa. St., 171; *Railroad Co. v. Reeves*, 10 Wall., 176.

I am of opinion, therefore, that the facts stated in the complaint do not constitute a cause of action in favor of the plaintiffs against the defendant. The demurrer must be sustained.

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MAY TERM, 1882.

PRESSLEY V. THE MOBILE, ETC., R. R. Co.

The agent of a railroad company charged with the supervision of its lands, the making of leases and contracts of sale, the collection of rents and "stumpage," instituted a criminal prosecution for the larceny of timber cut on said lands, which resulted in the acquittal of the accused. *Held*, that the act of the agent in instigating the prosecution was not within the scope of his agency, and the railroad company was not liable in a suit for malicious prosecution unless it was shown that the act of the agent in instituting the prosecution had been authorized or ratified by it.

Heard upon motion for new trial.

Messrs. D. S. Troy and H. C. Tompkins, for plaintiff.

Messrs. David Clopton and J. T. Norman, for defendant.

BRUCE, District Judge. This is an action for damages for a malicious prosecution, instituted by the plaintiff against the defendant, a corporation organized under the laws of Alabama and doing business in the state of Alabama. The declaration alleges that the defendant, on the 25th day of March, 1881, at Pollard, in the county of Escambia, in the state of Alabama, the circuit court for said county being then and there in session, . . . by its duly authorized agent, W. J. Van Kirk, upon oath wrongfully, falsely and maliciously, and without any reasonable or probable cause, . . . charged the plaintiff with having committed the crime of grand larceny; . . . that the defendant caused and induced the grand jury to find a bill of indictment against him; and that upon a writ issued he was arrested and held for trial upon the indictment, and afterwards, upon a plea of not guilty, he was tried in said court and acquitted, and the prosecution ended. To this declaration the defendant corporation plead not guilty.

The verdict of the jury was for plaintiff, and the main question made upon the motion for a new trial is, whether the defendant railroad company can be held responsible in

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damages for what Van Kirk did in the institution of the prosecution against the plaintiff, even if he was the agent of the defendant in the collection of rents, stumpages, and to sell and take charge of the lands of the company, and acted in the matter without probable cause.

It is not claimed that the agent, Van Kirk, had from the defendant railroad company any express authority to do what he did do in the matter of the institution of the prosecution of the plaintiff, nor is it claimed that there was on the part of the corporation, by any of its officers or agents, any subsequent ratification, approval or sanction of what Van Kirk had done in the matter of the prosecution; and the proposition of the defendant railroad company is, that it cannot be held for the malicious acts of its agent, Van Kirk, upon any implied authority to do what he did in the matter of the prosecution of plaintiff, and that it can only be held responsible upon proof showing express authority or subsequent ratification of his, the agent's, acts.

Van Kirk's employment was that of a land agent for the company, and he had and exercised supervision over the lands of the railroad company in Escambia and other counties in Alabama. He was in charge of their lands; made leases, collected rents, stumpage, and even negotiated sales of lands for the railroad company.

The question then is, can an agent, acting under such an authority, institute against parties a criminal prosecution for larceny or other offense against the criminal laws, committed in reference to the property in his custody as agent, and so bind his principal in damages for malicious prosecution, if it shall be shown that the prosecution was without probable cause and malicious?

It is settled law that corporations are liable for torts committed by their agents in the discharge of the business of their employment, and within the proper range of such employment. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How., 202; *Merchants' Bank v. State Bank*, 10 Wall., 645; Redf. on Railw., § 130, and authorities there cited.

It was formerly held that a railroad company could not be

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held for the wilful act of its employee, unless the act was previously ordered or subsequently ratified by the corporation. That rule has been modified, and in the recent case of *Gilliam v. S. & N. A. R. Co.*, not yet reported, the supreme court of Alabama, after saying that the rule has never been fully satisfactory, add:

"The precise modification is that if the agent, while acting within the range of his employment, do an act injurious to another, either through negligence, wantonness or intention, then for such abuse of the authority conferred upon him, or implied in his appointment, the master or employer is responsible in damages to the person thus injured; but if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not."

To this proposition many authorities are cited. The court proceeds:

"The older cases follow the doctrine declared in *McManus v. Crickett*, 1 East, 106, and relieve the master or employer from liability for tortious acts of the agent if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master. In *Selma, Rome & Dalton Railroad Co. v. Webb*, 49 Ala., 240, this court held that a railroad company cannot be sued in trespass for the wilful tort of its employee, unless the act was previously ordered or subsequently ratified by the corporation. We think the principle there announced should be so far modified as to limit its application to tortious acts of the agent done outside of his employment; to this extent we adopt the modified rule as applicable to railroads and their employees."

The question, then, is not whether the agent, Van Kirk, had been ordered by the railroad company to do the act complained of, or whether the act had been subsequently ratified by the corporation; nor is the question what was the agent's motive in what he did — whether to serve his principal or to carry out a purpose of his own; but the question is, and the

test of the matter is, was the act complained of done by agent Van Kirk in the course of his employment, and within the range of his duties as agent of the defendant railroad company?

Tested, then, by this rule, can it be maintained that Van Kirk, in the institution of the prosecution complained of, was acting within the range of his duties as agent, and in the course of his employment as such agent? He was in charge of the lands of the company, and it may be said that in every agency there is incidental or implied power and authority to the agent from his principal to employ all the necessary and usual means to execute the principal authority with effect.

Authorities are cited to this general proposition, and they show that this rule is carried, not only to the extent that an agent is authorized to employ the usual means to effect the object of his employment, but it goes so far as to authorize an agent to employ extraordinary means and remedies provided by law; as, for instance, when an agent is authorized to collect a debt he may not only bring suit, but may resort to attachment process, or to a replevin or detinue suit, and has authority to bind his principal in a bond required by law in order to obtain such remedy.

Cases are also cited to the proposition that an agent authorized to collect a debt, may, when the law allows it, arrest and imprison the debtor, upon the principle that it is one of the means of the recovery of the debt.

Imprisonment for debt, however, is inhibited by article I, § 22, of the state of Alabama; and conceding that Van Kirk, in order to carry out the objects and purposes of his appointment, might employ all the usual and even the extraordinary means and remedies provided by law, still the question remains, could he for such a purpose resort to a criminal prosecution, and so bind his principal for damages, if the prosecution were malicious?

It is claimed that, by section 4362 of the Revised Code of Alabama, a criminal prosecution for larceny is a means for

the recovery of a debt, because by its terms the owner of the property stolen may recover the value of his property. That section provides in cases of conviction for larceny, and when the property has not been returned, ". . . the assessed value shall be made an item in the costs of the case, and whenever the costs in such cases, including the value of the property stolen, are paid or worked out at hard labor, the court of county commissioners must, upon a proper showing, allow and draw a warrant on the county treasury in favor of the owner of such property, for the value thereof, to be paid out of the fund arising from the proceeds of such labor."

In view of the constitutional provision to which we have referred, it can hardly be maintained that it was the object of this statute to furnish a remedy to a party whose property had been stolen, and thus give sanction to the idea that a criminal prosecution may be resorted to as a means for the recovery of a debt. It is more consistent to say that this provision of the law was not intended for the benefit of the person whose property had been stolen, but that it was to lend additional sanction to the law, and thus more effectually deter persons from the commission of this class of crimes.

When crime is committed against person or property, it is a menace to the public welfare, and the law is invoked to protect society and vindicate public justice. Grand juries are not organized to make inquest and indict persons in order that some one whose property has been wrongfully taken may have restitution, but courts and juries are charged with the administration of the law for the public good.

An argument is made that there is no more effectual way by which this property of the railroad company (its timber lands) could be protected than by invoking the criminal law against depredators upon it, and the prosecutions in the United States courts are referred to, showing the purpose and efficiency of this remedy in protecting the public lands from spoliation. Grant all that can be said upon that subject, and it does not show that an appeal to the criminal law of the land by the individual citizen is a proper means to

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obtain redress for a private wrong. When an offense is committed against the law, as to the person or property of the individual citizen, he properly makes complaint and institutes a prosecution against the wrong-doer; but he does so in vindication of the law which has been violated on his person or property, and not to secure a remedy to himself for his private wrong.

In the case at bar, if the property of the corporation defendant in charge of its agent Van Kirk was depredated upon, and the criminal law violated in regard to it, it might have been the agent's duty to complain to the officers of public justice, and even to take proper steps to have the matter presented to a grand jury; but in doing so could he act otherwise than as a citizen—that is, in the absence of express authority from his company so to do?

The question is, can such action on his part be held to be within the scope of his agency and in the course of his employment? There may be, and the books recognize some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency, and in the course of his employment, is a proposition which, in the light of the decided cases, cannot be maintained. There are cases to the contrary. *Carter v. The Howe Sewing Machine Co.*, 51 Md., 290, and authorities there cited.

This conclusion seems to be strengthened by another view of the subject. Corporations can only act by means of agents and employees, and the decided cases upon the question of the liability of corporations for the acts of their agents and employees are mainly cases in reference to railroad corporations where the employees were employed in the operation of rolling stock upon the road in the transportation of freight and passengers. In these cases, employees such as conductors, engineers, and others are put in their positions by the corporations, and are charged with the management

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and control of agencies and instruments put into their hands by, and to be used by them in behalf of, the corporation in its business, and while so employed the railroad company must be held to assent to their acts, for they are the *corporation* itself *in action*, and it is bound for their acts, whether done negligently, unskilfully, or wilfully.

In the case at bar the employment of Van Kirk as agent was not an employment of this character; his agency was not connected with the operation of the railroad, and he was not charged with the property of the railroad company used in the operation of the railroad. His agency had reference to other property altogether, and his action in regard to it cannot be held to be the action of the corporation in the same sense and to the same extent as if he had been an engineer or a conductor employed and charged with the management and control of the means and agencies by and with which the corporation carried on its business.

The conclusion is that when Van Kirk invoked the criminal law as he did he was not acting within the scope of his agency, or in the course of his employment, and the company cannot be held responsible for his action, and that, therefore, the motion for a new trial must prevail; and it is so ordered.

THOMAS B. TAYLOR v. THE SOUTH & NORTH ALABAMA RAILROAD COMPANY AND OTHERS.

1. A contract between two corporations not authorized but not forbidden by their charters will not, if executed, be overturned, but will be allowed to stand as the basis of the rights of the parties acquired thereunder.
2. An executed contract constructively fraudulent, for the issue of preferred stock, made by a corporation in excess of its corporate powers, but not forbidden by law or against public policy, will not, after an acquiescence of ten years by the stockholders, be disturbed at their suit on the ground that it was *ultra vires*.
3. In a suit in equity to annul a contract for fraud, the party who seeks to escape the bar of the statute of limitations on the ground that he

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did not discover the fraud within the time allowed by the statute for bringing the suit, must fully show the circumstances of the discovery, and that it could not, by the exercise of reasonable diligence, have been sooner made.

4. The holder of capital stock in a corporation, who has paid for it and claims it as his own, and has the certificate therefor, is not a trustee for other stockholders, so that the statute of limitations does not run in his favor.

IN EQUITY. Heard upon demurrer to the amended bill.

Messrs. David Clopton, H. A. Herbert, W. L. Chambers, W. S. Thorington, W. G. Hutcheson, Smith and McDonald, for complainants.

Messrs. Samuel F. Rice and Thos. G. Jones, for defendants.

BRUCE, District Judge. The amended bill assails the title and right of the Louisville & Nashville Railroad Company to the two millions capital stock in the South & North Alabama Railroad Company, issued to the former company as the successor and assignee of Tate and associates in their contract with the latter company, for the building and equipment of its road — the South & North Alabama Railroad.

By the terms of the contract between the South & North Alabama Railroad Company and Samuel Tate and associates, of date March 21, 1871, it agreed to "issue to Sam. Tate and associates, at forty cents on the dollar, preferred stock bearing six per cent. interest, guarantied payable in kind from date of issue for twelve months after the completion of the road and thereafter in cash." . . .

By contract of May 19, 1871, which recites the assignment and transfer to the Louisville & Nashville Railroad Company of the contract of Tate and associates with the South & North Alabama Railroad Company for the considerations therein named, the Louisville & Nashville Railroad Company "assumes and binds itself to perform all the obligations imposed by said contracts on said Sam. Tate and associates." . . .

And by contract of same date — May 19, 1871 — between the two railroad companies named, the South & North Ala-

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bama Railroad Company agrees that it will issue to the Louisville & Nashville Railroad Company the said two million dollars of preferred or interest-bearing stock specified in said contracts with Sam. Tate and associates, if legally entitled to do so.

These contracts are made exhibits to the amended bill.

The proposition of the complainant is, that the South & North Alabama Railroad Company had no power under its charter to issue this two million of preferred or interest bearing stock, and that its issue to the Louisville & Nashville Railroad Company was a fraud upon the other stockholders of the corporation who held common stock; that the issue was a fraud upon the law, is void, and confers no right upon the Louisville & Nashville Railroad Company to hold and own said stock.

To this amended bill, the respondents, the Louisville & Nashville Railroad Company and the South & North Alabama Railroad Company, interpose demurrers, and as they raise, substantially, at least, the same questions, they may be considered together.

Many causes of demurrer are assigned, but the questions raised go mainly to the right and title of the Louisville & Nashville Railroad Company to hold the two millions of stock in question, and to the legal right of the South & North Alabama Railroad Company to issue the preferred interest-bearing stock, which it is alleged it contracted and agreed to issue and did issue to the Louisville & Nashville Railroad Company.

The demurrers also raise the question, that even if the issue of the stock was *ultra vires* and in excess of the powers granted by the charter of the South & North Alabama Railroad Company, the contract being now a fully executed one, a court of equity will not at the suit of stockholders disturb the contract which has now become the foundation of the rights of the parties.

The question of the statutes of limitation of six and ten years of the state of Alabama is also raised and held to bar the

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relief sought by the complainant in his amended bill, and that the complainant is chargeable with laches, and must be held to have acquiesced in the wrongs of which he now complains, and that his conduct since the issuance of the stock in question works an estoppel upon him in the matters as to which he now seeks relief.

Much argument has been made and many authorities cited to show that the South & North Alabama Railroad Company, under what are claimed to be the very ample powers given in its charter, had the right to issue interest-bearing stock at forty cents on the dollar, as it did do, and that in so doing it did not act *ultra vires* of its charter powers, but within them; that such issue of capital stock was but a mode of borrowing money, which it had express power to do, and that the stock was assets of the corporation, and the directory, who were authorized to manage the affairs of the said company, had the power to dispose of it upon the best terms possible, to the end that the purpose and object of the corporation might be accomplished.

It is also claimed that as it is not alleged that the directory acted unfairly or in bad faith, and that they did not get all the stock was worth at that time, a court of equity will not disturb the transaction.

It is not deemed necessary to discuss and pass upon these questions and others which have been pressed upon the court in argument, because the case must turn upon the proposition that this contract for the issue of the stock in question is an executed contract made in May, 1871, and by the allegations of the bill the stock was actually issued, delivered and paid for in the year 1871, and since that time, which is more than ten years prior to the filing of the amended bill, the respondent the Louisville & Nashville Railroad Company have held, and voted at the meetings of the stockholders of the company, this stock, and the complainant, a stockholder in the company, took no steps during all this time and instituted no proceeding to enjoin his company or in any way to prevent the evils or obtain redress for the wrongs of which he now complains.

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Admitting that the South & North Alabama Railroad Company had no authority under its charter to issue this stock, and that the Louisville & Nashville Railroad Company had no authority under its charter to purchase and hold it, still, the charters of the respective companies did not forbid it, and the rule is: That contracts which, though invalid for want of corporate power, yet, if fully executed, they shall remain as the foundation of rights acquired by the transaction.

Authorities upon this point are numerous; a few only are cited: *Hitchcock v. Galveston*, 96 U. S., 341; *National Bank v. Graham*, 100 U. S., 699; *National Bank v. Matthews*, 98 U. S., 621; *Spring Co. v. Knowlton*, 103 U. S., 49; *Thomas v. R. R. Co.*, 101 U. S., 71, in which it is said: "The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."

I think that reason and authority alike sustain the proposition that a stockholder of a corporation will not be allowed after a reasonable time to disturb and rescind a contract made by his corporation after the same has been fully executed, on the ground that it is *ultra vires* and in excess of the corporate powers granted by the charter of the corporation.

It is to be observed, however, that the case at bar is not simply a case of the exercise of power in excess of that granted in the charter of the corporation, but it is a case in which the matter complained of is the issue by the corporation of preferred interest-bearing stock, guarantied at forty cents on the dollar, to the amount of \$2,000,000, for which only \$800,000 was paid.

The proposition of the complainant is that such a transaction is in itself a fraud — a fraud upon the other stockholders of the company who hold common stock, and that an issue of such stock is not only voidable, but void — a fraud upon the law.

In support of this proposition a number of authorities are cited: *Burke v. Smith*, 16 Wall., 390; *Sturges v. Stetson*, 1 Biss., 246; *Fosdick v. Sturges*, 1 Biss., 255.

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The proposition that any action of a corporation which gives to one class of its stockholders a preference over another class in sharing the earnings of the corporation, is a violation of the rights of the holders of non-preferred stock, and is illegal, seems to be sustained both upon reason and authority; but may not such illegality be cured by the assent, express or implied, of the holders of the non-preferred stock?

Does the case of *Sturges v. Stetson*, cited *supra*, which holds such action to be a fraud upon the law, go so far as to hold that it is a fraud which cannot be condoned or cured, and that no conduct on the part of the holders of the non-preferred stock will work an estoppel upon them in making objection to it?

What is the true quality, legal and moral, of the issue of preferred stock, such as the stock in question, by a railroad corporation with the charter powers of the South & North Alabama Railroad Company?

Can it be said that such a transaction involves actual fraud and moral turpitude — that it is in violation of public policy, and fraught with harm to the state? By act of February 26, 1872, the law-making power of Alabama amended the charter of the South & North Alabama Railroad Company, and provided that the capital stock of said company should be three millions of dollars, or more if required, . . . of which the sum of two millions might be issued as preferred stock, the same to be made up of shares of one hundred dollars per share.

I am not now speaking of the effect of this amendment, except to say that certainly the legislature of Alabama did not intend by this act to authorize this railroad company to do that which was a violation of public policy, or to shield the company and its officers from responsibility for having done that which was wrong in itself and an actual fraud.

The phrase "fraud upon the law," used in the opinion of the court in the case of *Sturges v. Stetson*, cited *supra*, must mean no more than that the issue of preferred stock, under the circumstances there stated, is in violation of the principle of equality of right among stockholders of a corporation who

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unite their capital upon equal terms in a common enterprise, and are therefore entitled to share equally and without preference in the profits or avails of the enterprise.

The issue of the preferred stock in question was not forbidden by the charter of the corporation, it was not in violation of any statute law, was no public evil, and did not affect the state to its harm, and, if wrong and without legal justification, it was so only because it affected injuriously the private rights of the stockholders of the corporation who held common and non-preferred stock.

The fact, then, that this issue of stock was preferred stock does not take the case out of the rule that non-assenting stockholders in the corporation, if they do not in a reasonable time dissent, and take steps to make their dissent effectual, will afterwards be held to have tacitly assented to the act.

To this proposition there is not only reason, as I have attempted to show, but there is authority in the cases of *Hazlehurst v. Savannah & G. R. R. Co.*, 43 Ga., 13; *Kent v. Quicksilver Mining Company*, 78 N. Y., 159.

These are both of them cases in which preferred stock had been issued, and elaborate opinions were delivered by the respective courts, and while in the case first cited the majority of the court held that the directors had power to issue the preferred stock in payment for work done in building the road, yet the court, on page 54, say: "The question is not whether the directors had power to make it, but whether after it has been made, after the company has upon its part got the benefit of the contract, after the other parties have upon the faith of it spent their money, and the company has acquiesced in the act of the directors, either the whole company or a portion of the stockholders can come forward and repudiate the contract?"

On the next page the court answers the question and says: "Such acts, though directly contrary to the provisions of the charter, if they be authorized by the stockholders or

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acquiesced in or confirmed, cannot be avoided after third persons have acted upon them."

The case of *Kent v. Quicksilver Mining Company* seems to be still more in point, because there the court held, as I incline to hold here, that there was no power in the directors to issue preferred stock. The court say on page 184:

"But there remains a serious question, whether, though there was at the out-start a minority of the stockholders who gave no assent to the corporate act, there has not been such tacit acquiescence and delay in action by that minority as to amount to indefensible laches and estoppel upon those who constituted it, and their assigns? In our judgment there has, and we find here a safe place on which to rest our decisions of these cases."

So much in point here does the opinion in this case seem to be, that I cannot forbear to make a further quotation from page 185, where the court continues:

"For the lapse of four years, however, there was no action of the company or an individual stockholder to have a judicial declaration that the company had exceeded its powers and that it was invalid. We think that these facts, most of which are set forth in the findings of two of the cases, warrant the conclusion of law thereon, that the stockholders, by acquiescing in the action of the corporation in making the preferred stock, have ratified and assented thereto, and the same is binding upon them by reason of such assent and ratification."

Applying these principles to the case at bar, it is clear that whatever might have been the rights of complainant, if he had promptly and actively sought redress for the wrongs complained of in reference to the issuance of this stock, he cannot now be allowed to disturb the contract of his corporation by which the stock was issued, delivered and paid for over ten years prior to the institution of his suit.

It is claimed that the law of Alabama is different from this, and that by a line of decision coming down to the case

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of *Chambers v. Falkner*, 65 Ala., 451, it has been settled that contracts of corporations which they have no power in their charters to make, are void; that the courts cannot enforce them.

But none of the cases cited are like the case at bar, in which complainant is not seeking to enforce an executory *ultra vires* contract, but the case is one of an executed contract, where the party paid his money and obtained his stock, and now stands upon the defensive and says that the corporation with which he dealt and the stockholders of the corporation cannot now rescind the contract.

Besides that, this is a question of general corporate law, and even if the supreme court of Alabama has held the doctrine claimed, this court would not be bound by the decision, and at most it would be but persuasive.

Complainant invokes section 3242 of the Revised Code of Alabama, which provides:

“In actions seeking relief on the ground of fraud where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit.”

Complainant avers in his bill that “he was ignorant of the fact that said stock issued to the Louisville & Nashville Railroad Company was preferred stock or that it bore interest, and of the terms and contract by and upon which said stock was issued to the said Louisville & Nashville Railroad Company, until the filing of the answers of the defendants to your orator’s original bill. And that your orator had no knowledge or notice of any of the fraudulent acts of the said Louisville & Nashville Railroad Company which are averred and charged in your orator’s original bill, or of any facts to put your orator upon inquiry or create suspicion of such fraudulent acts, until within less than twelve months before said original bill was filed.”

This statute determines that in the class of cases to which it refers the action shall not be considered as having accrued

until the discovery by the aggrieved party of the facts constituting the fraud, and the allegation of complainant's bill is that he was ignorant of these facts until the filing of the answers of defendants to his original bill.

To bring the allegation within the statute, the complainant must mean by saying that he was ignorant of the facts until the filing of the answers, that he then, from the answers, discovered the facts constituting the fraud.

A discovery of facts by an aggrieved party would seem to imply a seeking for knowledge by such party; and the statute certainly was not intended to absolve a party from all effort or diligence to obtain a knowledge of the facts constituting the fraud complained of.

The statute was certainly not intended and did not change the rule of equity upon the subject of diligence in such cases, and thus benefit those only who might be wilfully ignorant, or who, from carelessness and indifference, should neglect to avail themselves of the means of information upon the subject.

The opinion of the supreme court of Alabama in the case of *Porter v. Smith*, 65 Ala., 169, upon the construction of this statute, is in accordance with this view.

There must, then, be some disposition and effort to obtain a knowledge of the facts, and that is what the law calls reasonable diligence.

The question is not simply what facts the complainant actually knew, but of what facts might he have obtained knowledge had he sought it from the natural sources of information which were at his command.

It is held in numerous cases that the means of knowledge are the same thing in effect as knowledge itself. And in the case of *Wood v. Carpenter*, 101 U. S., the supreme court, discussing not merely the Indiana statute but the general principle as well, say, at page 143: "The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

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Applying these rules to the case at bar, the conclusion is inevitable, that, if the complainant did not actually know that the stock issued was preferred stock, he certainly had within his reach the means of knowledge.

He was a stockholder in the company. It was incorporated to build and equip a railroad connecting north and south Alabama, an enterprise of magnitude, involving the expenditure of large amounts of money. It, like other enterprises of the kind, experienced many vicissitudes and difficulties, as the legislation of the state and the public history of the times abundantly show, and it is difficult to see how he could have remained ignorant of the facts of which he complains, if he had used any diligence at all to obtain knowledge in regard to them.

He does not say that he was ignorant that two millions of stock was issued to the Louisville & Nashville Railroad Company, but that he was ignorant that the stock issued was preferred stock, or that it bore interest, and of the terms and contract by and upon which said stock was issued.

It is fair, then, to infer that he knew, in the year 1871, that two millions of stock had been issued to the Louisville & Nashville Railroad Company, and he could hardly presume that at that time the stock of the South & North Alabama Railroad Company was worth par, or that any one would take it at par, and it would seem to be a very natural and reasonable inquiry for any one interested in the matter to make, as to the terms upon which this majority of the stock of the company was taken by the Louisville & Nashville Railroad Company.

Ignorance in regard to that matter is consistent only with carelessness and indifference, superinduced perhaps by the idea that the stock was of little value (for I think that may be fairly inferred from the allegations of the bill), that it was not worth a serious thought or an inquiry, and therefore no inquiry was made, though the sources of information were not closed, and if applied to would doubtless have disclosed, not only that the stock was issued, but that it was preferred

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or interest-bearing stock, and that it furnished the means by which the railroad was being built.

If that hypothesis is the true one, it repels all idea of relief such as is sought in this bill, for Lord Camden's maxim, in relation to a court of equity, must be borne in mind: "Nothing can call this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."

One other point:

It is claimed that the statute of limitations does not run here in favor of the Louisville & Nashville Railroad Company as the owner of this stock, because there exists the relation of trustee and *cestui que trust*.

But what constitutes the trust, and who is the trustee in whose favor the statute does not run?

The Louisville & Nashville Railroad Company claims to be the owner and holder of this two millions of stock, and to say that it holds the stock in trust for the benefit of the complainant, or any one else, is a confusion of ideas. We are not dealing now on this amended bill with the property of the South & North Alabama Railroad Company, which is held by the corporation in trust for the benefit of the stockholders of that corporation, and we are not here concerned with the breaches of that trust, which the complainant charges in his original bill upon his own company and the Louisville & Nashville Railroad Company, which he charges, by virtue of its ownership of a majority of the stock of the South & North Alabama Railroad Company, is enabled to, and in collusion with the South & North Alabama Railroad Company, is using and controlling the property and earnings of that corporation, in breach of the trust imposed upon it and in fraud of the rights and interests of the stockholders of the company.

It is a general principle that the property of a corporation is a trust fund for the benefit of the stockholders, in the hands of the corporate body, which is the trustee; but capital stock in the corporation, the certificate or evidence of

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which is in the hands of its owner, who has paid for it, is neither a trust fund nor is its owner a trustee, and it is not perceived why statutes of repose do not run to protect the owner in his right to such property, the same as it would in reference to any other class of property.

The result of these views is, that the demurrers to the amended bill are sustained.

NOVEMBER TERM, 1882.

BRANCH V. HAAS.

A contract made since the late civil war for the sale and delivery of coupon bonds, issued by the Confederate States of America, is based on an illegal consideration, and is therefore void.

The case was heard upon demurrer to a special plea which is set out in the opinion of the court.

Messrs. W. L. Bragg and W. S. Thornton, for plaintiff.

Messrs. Sam'l F. Rice and A. A. Wiley, for defendant.

BRUCE, District Judge. This suit is brought for damages for the breach of a contract made since the late civil war for the sale of two hundred bonds, of the nominal value of \$200,000, which the plaintiff alleges he purchased of the defendant at the rate and price of \$4 per thousand, to be delivered to plaintiff by the 29th day of October, 1881, which the defendant failed to do, to the damage of the plaintiff in the sum of \$1,500.

The defendant pleaded a special plea in which it was alleged:

"That the contract sued on was based upon the sale by defendant, for future delivery to plaintiff, of certain obligations, commonly called Confederate coupon bonds, that were issued by a combination called the Confederate States of

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America, in open and avowed renunciation of the authority of the government of the United States, and for the express purpose of making war against and overthrowing the lawful government of the said United States; that said contract, which is the foundation of this suit, was an illegal transaction, opposed to public policy, and void; and that the consideration of said contract is illegal, under the principles of public policy, the constitution of the United States, and the laws of congress. . . .”

To this plea a demurrer was filed which raised the question, whether a contract for the purchase of Confederate coupon bonds and for their delivery on October 29, 1881, is a valid contract, for the breach of which damages may be recovered? That the bonds themselves are void there can be no question, for they were issued in violation of public policy, and by a pretended government asserting itself in hostility to the lawful government of the United States, which has long since ceased to have any actual existence, and never had any legal or rightful existence, as determined by the final arbitrament of war. Not only so, but after the war of the rebellion, and after the so-called government of the Confederate States of America, under the authority of which these bonds were issued, had ceased to have any actual existence, the constitution of the United States was amended, and by section 4 of the fourteenth amendment of the same it is provided:

“Neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.”

The bonds in question, then, are illegal and void by the constitution of the United States. But it is said, and the argument is, that this suit is not brought upon the illegal and void bonds or obligations, but is brought upon a separate and independent contract, which is not tainted with the illegal character of the bonds for the sale and delivery of

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which the contract upon which the suit is brought was made. True, the suit is not upon the bonds, but it is on a contract for the sale and delivery of bonds, which bonds, by the constitution of the United States, must be held illegal and void. What, then, is there to support the promise and undertaking of the defendant to sell and deliver the void bonds?

The defendant, by the terms of the contract, was to receive \$4 per one thousand for the bonds. He failed to deliver them according to his undertaking and promise, and to recover damages against him for this breach of his contract this suit is brought. If the defendant had delivered these void and illegal obligations and taken a note or other written obligation for the price, can it be maintained that the obligation would be good as a separate and independent contract, though the entire consideration for which it was given was illegal and void? In such a case, the note might be said to be collateral to the illegal obligation and one remove from it, so that it is not infected with the taint which inheres in the bonds for which it was given; but how can a contract or obligation be separated from the consideration upon which it is made? And while a promissory note or written obligation is *prima facie* evidence of a good and valuable consideration, yet, if such consideration is, in fact, illegal, and shown to be so, the note cannot be enforced, for it is without consideration to support the promise.

If it be true, then, that the sale and delivery of the obligations in question could not support a promise to pay for them, it follows that the failure to deliver according to promise cannot raise any implied promise such as would support a suit for damages on account of such failure. This view of the subject is supported by the supreme court of the United States in the case of *Hanauer v. Doane*, 12 Wall., 343; *Hanauer v. Woodruff*, 15 Wall., 439; *Sprott v. United States*, 20 Wall., 459.

In the case of *Hanauer v. Woodruff*, cited *supra*, the court says:

“The contract sued on is not the same but a different con-

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tract, yet it is connected with that contract by the fact that the bonds constitute its consideration. . . . It thus draws to itself the illegality of the original transaction. . . . When a contract is thus connected, by its consideration, with an illegal transaction, a court of justice will not aid its enforcement."

The plaintiff relies upon the authority of *Thorington v. Smith*, 8 Wall., 1. That was a case where property had been sold in 1864, while the war was flagrant. The property was real estate. A portion of the purchase money was paid in Confederate treasury notes, which was the currency, and substantially the only currency, in circulation at the time here, in Montgomery, Alabama, where the transaction took place and where all the parties resided at the time. A note was given for the unpaid portion of the purchase money, \$10,000, and after the war ended and the Confederate States of America passed out of existence, suit was brought for the unpaid portion of the purchase money of the property, and the question was whether the note could be enforced. The transaction of sale of which it was a part was in Confederate treasury notes, and it was proposed to be shown that it was the understanding of the parties that the note also was to be paid in the same currency. The court held that such contracts could be enforced in the courts of the United States, after the restoration of peace, "to the extent of their just obligation;" but the opinion of the court shows that this result was reached, not because of any recognition of Confederate treasury notes as of any just and valid obligation, or that transactions based upon such currency should be upheld, except as to persons residing within Confederate lines, and where such currency was the only currency in which exchanges in the common transactions of life could be made; and in speaking of such currency the court said in that case: "It must be regarded, therefore, as a currency imposed upon the community by irresistible force."

This case of *Thorington v. Smith* is commented on in the

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subsequent case, *Hanauer v. Woodruff*, cited above, which was a suit on a promissory note, dated at Memphis, Tennessee, December 22, 1861, the consideration of which was bonds issued by the authority of the convention of Arkansas which attempted to carry the state out of the Union, for the purpose of supporting the war levied by the insurrectionary bodies then controlling the state against the federal government. In that case the court held that the bonds did not constitute a valid consideration for the note sued on, even though bonds of that character were used as a circulating medium in Arkansas and about Memphis, Tennessee, in the business transactions of the people.

On page 449 the court distinguishes this case from the case of *Thorington v. Smith*, and says: "The difference between the two cases is the difference between submitting to a force which could not be controlled and voluntarily aiding to create that force."

It is argued that the transaction in question having taken place long since the war, there could have been no intent and no effect which could in any way afford aid to the rebellion, and that, therefore, the transaction is not obnoxious to public policy and may be treated as valid. The origin, however, of such bonds and obligations as we are now considering is such, and the relation of their makers to the government of the United States is such, that a court of the United States must hesitate to give them any recognition whatever. Confederate treasury notes and coupon bonds were all tainted with the illegal purpose which was the occasion and gave rise to their issue, and the fact that the Confederate States of America, so called, failed to make good the purpose of its illegal organization, did not and could not remove the taint, but the contrary; and the exception made in favor of currency, not bonds, arose out of the necessity of the case, and to prevent injustice to people who, when war was flagrant, had no other currency in which to make the exchanges required in the ordinary business of life.

The case at bar does not fall within this exception, and

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the illegality of the bonds in question is not left to the general principles of public policy, but it is determined by the written law of the land — the fourteenth amendment to the constitution of the United States.

The demurrer is overruled.

MAY TERM, 1883.

UNITED STATES v. PAUL STROBACH.

1. In an indictment, under section 5438, Revised Statutes, for presenting for approval a false claim against the government to an officer in the civil service of the United States, the averment that the claim was presented to T., then late marshal, he being then and there an officer in the civil service of the United States, is not repugnant, but is accurate and sufficient.
2. An averment in such an indictment that said claim so presented was for services purporting to have been performed by a deputy marshal in a criminal proceeding before a commissioner of a United States circuit court, in which the United States was the plaintiff, and that it was a claim in favor of the late marshal against the United States, is sufficient to show that the said late marshal was the proper officer to whom said claim should be presented for approval.
3. The account of fees of a deputy marshal for services rendered by him is incorporated in the account of the marshal against the United States. Therefore the averment that the claim for fees of the deputy was one in favor of the marshal, and was presented to him for approval, is not absurd or repugnant.
4. The marshal is, within the meaning of section 5438, Revised Statutes, an officer to whom it is an offense, punishable by that section, for a deputy marshal to present for approval a false claim for fees.
5. An indictment under section 5438, which avers with the requisite certainty the presentation by the defendant for approval to an officer in the civil service of the United States, with intent to defraud the United States, of a false, fictitious and fraudulent claim against the government of the United States, knowing the same to be such, covers every element of the offense prescribed in the section, and is sufficient.

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6. The presentation for approval to a district court of the United States of a claim against the government of the United States is a presentation to an officer in the civil service of the United States, within the meaning of section 5438, Revised Statutes.
(Before WOODS and BRUCE, JJ.)

Heard upon demurrer to the indictment.

Messrs. W. H. Smith, United States Attorney, and *Samuel F. Rice*, for the United States.

Messrs. David Clopton, George Turner and George H. Patrick, for the defendant.

WOODS, Circuit Justice. The defendant is indicted under section 5438 of the Revised Statutes. So much of the section as refers to the charges against him is as follows:

"Every person who makes, or causes to be made, or presents, or causes to be presented, for payment or approval to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . any person so offending in any of the matter set forth in this section shall be punished," etc., etc.

The defendant is charged in an indictment containing four counts.

The first count alleges that the defendant, claiming to be a deputy marshal of the United States, did present for approval on a day mentioned to George Turner, then late marshal of the United States, he being then and there an officer in the civil service of the United States, a false, fictitious and fraudulent claim against the government of the United

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States, with intent to defraud the United States, which claim was an account purporting to have been for services rendered and payments made by said deputy marshal in the case of the United States v. Isaac Hart, in a criminal proceeding before W. H. Hunter, commissioner of the circuit court of the United States, dating from January 19 to January 25, 1880, inclusive, and in favor of the said George Turner, the then late marshal as aforesaid, which claim was false, fictitious and fraudulent in the following statements and entries therein contained:

[Here follows a recitation of the alleged false, fictitious and fraudulent entries.]

The count then proceeds: "The defendant, well knowing the same to contain the said false, fraudulent and fictitious entries."

The second count charges that the defendant did "use a false affidavit of the correctness of the claim mentioned in the first count, for the purpose of aiding to obtain the payment of said claim, knowing the same to contain false, fraudulent and fictitious statements and entries as follows, to wit:

[Here follows a copy of said entries, identical with those contained in the first count.]

The count then proceeds as follows: "He, the said Paul Strobach, deputy marshal as aforesaid, well knowing the same to contain each and every false, fraudulent and fictitious statement and entry aforesaid."

The third count charges that the defendant, claiming to have been a deputy marshal of the United States, did cause said George Turner, then late marshal of the United States, to present to and for approval by the district court of the United States for the middle district of Alabama, in open court at the May term, 1880, the Honorable John Bruce, judge of the United States district court for the middle district of Alabama, then and there presiding, as well as to and for the approval of said Honorable John Bruce, district judge, presiding as aforesaid, he being then and there an officer in the civil service of the United States, a false, fictitious

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and fraudulent claim upon and against the government of the United States.

The count proceeds to describe the claim in the same terms as those used in the first count, and concludes with the averment that the defendant well knew said claim to be false, fictitious and fraudulent in each of the statements and entries aforesaid.

The fourth count is, in all respects, similar to the second.

To this indictment the defendant filed his demurrer, alleging grounds of demurrer to each count, which we shall proceed to consider.

The law now in force regulating the taxation of cost and the approval of the accounts of clerks, marshals and district attorneys is the act of February 22, 1875, and entitled "An act regulating fees and costs, and for other purposes." Sup. to Rev. Stat., vol. 1, p. 145.

So much of this act as is pertinent to this case is as follows:

"Sec. 1. That, before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the treasury in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in the presence of the district attorney, or his sworn assistant, whose presence shall be noted on the record, prove in open court, by his own oath, or that of other persons having knowledge of the facts to be attached to said account, that the services therein charged have been actually and necessarily performed, as therein stated; . . . and the court shall thereupon cause to be entered an order approving or disapproving the account, as may be according to law and just."

Previous to the enactment of this law, the matter of the approval of the accounts of clerks, marshals, etc., was regulated by section 846 of the Revised Statutes, which provided that such accounts should be examined and certified by the dis-

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trict judge of the district for which the officers were appointed, before they were presented to the accounting officers of the treasury department for settlement.

The elements of the offense created by section 5438, which it was the purpose of the first and third counts to charge, are as follows:

The presentation for approval to any person or officer in the civil service of the United States of a claim against the United States, which the party presenting knows to be false, fictitious or fraudulent.

The elements of the offense prescribed by the statute, which it was the purpose of the second and fourth counts to charge, are as follows:

The using, for the purpose of aiding to obtain the payment of a false, fictitious or fraudulent claim upon or against the government of the United States, of a false affidavit, knowing the same to contain any fraudulent or fictitious statement or entry.

If the counts of this indictment charge against defendant, as required by the rules of criminal pleading, an offense against the United States, they will be good and sufficient in law. We shall, therefore, consider the counts and look into the particular grounds of demurrer to ascertain whether this has been done.

It is alleged as ground of demurrer to the first count that it does not sufficiently charge that Turner, to whom the account was presented for approval, was an officer in the civil service of the United States, because it is alleged that when the account was presented he was the "late marshal." There is, however, besides the averment that he was late marshal, a distinct averment that he was then and there an officer in the civil service of the United States. Now, if a marshal whose time has expired can by law still be an officer in the service of the United States, then that fact is well averred, and there is nothing repugnant between the two averments. A marshal whose time has expired is, for the performance of certain duties, still an officer. Sec. 790 of the Revised

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Statutes declares that every marshal or his deputy when removed from office, or when the term for which the marshal is appointed expires, shall have power to execute all such precepts as may be in their hands respectively, and the marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody, etc.

A marshal is appointed for a period of four years. When his time is out, it is true he does not hold over until his successor is appointed or qualified, but by the provisions of the section just cited he is still an officer for the performance of the duties therein specified. After his term of office expires it is also his duty to settle his accounts with the government, and to do this he must necessarily receive and pass upon the accounts of his deputies. He discharges this duty under the sanction of his official oath, and the obligation of his official bond. When, therefore, the first count of the indictment described Turner as late marshal, and averred him to be, when the account was presented, an officer in the civil service of the United States, the description was accurate and pertinent, and not repugnant. We are of opinion, therefore, that it is sufficiently averred that the account was presented to an officer in the civil service of the United States.

It is next stated as ground of demurrer to the first count that the services alleged to have been performed, and payments, alleged to have been made, by the defendant, are not charged to have been services and payments for the United States, or that the services were performed and payments made by defendant as deputy marshal, so as to show that the marshal was the proper officer to whom said claim should be presented for approval. But we think it is sufficiently averred that the services were performed for the United States. The claim is alleged to be a claim against the United States; it is alleged to be for services purporting to have been performed by said deputy marshal in a criminal proceeding before a United States commissioner, in which the United States was the plaintiff, and that it was a claim in favor of the said Turner, late marshal, and against the United States.

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These averments make it perfectly apparent that the account was for services rendered the United States by a deputy marshal, and that the marshal was the proper officer to whom his deputy should present the account for allowance.

It is next alleged that the first count is repugnant, because it avers that the claim was presented to George Turner for his approval, and also avers that the claim was in favor of George Turner.

The method of procedure prescribed by law for the settlement of the accounts of marshals, of which the court takes judicial notice, and which it is, therefore, not necessary to aver, makes it apparent that there is no ground for this objection to rest on. The law authorizes the appointment of deputy marshals (Rev. Stat., sec. 780), prescribes their oath of office (Rev. Stat., sec. 782), in which they are required to swear that they will take only their lawful fees. In all cases, except where specially provided by statute, a deputy marshal has the same powers, and may perform the same duties, as the marshal. To prevent a multiplicity and complication of accounts, the fees of the deputies are presented to the government for allowance through the marshal, and in an account made out in his name, of which the verified account of the deputy for his services forms a part. The money collected on this account is paid in the first instance to the marshal, who pays the deputy his share. The accounts of the deputy are made out against the United States, and in favor of the marshal. It may, therefore, well be averred that the account of a deputy marshal, in favor of the marshal, and against the United States, was presented to the marshal for his approval. There is nothing absurd or repugnant in such an averment.

But it is contended by defendant that the marshal is not an officer authorized by law to approve a deputy marshal's account.

It will be observed that the section on which the indictment is based makes it an offense to present a false claim for approval to any person or officer in the civil, military or naval

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service of the United States. The presentation need not be to an accounting or auditing officer. It need not be to an officer at all. It may be to any person in the civil, military or naval service of the United States. The approval meant by the statute is not, therefore, confined to the passing of the claim by the accounting officers of the treasury, or its approval by a court or judge. When a deputy marshal presents his itemized account for his fees and costs, verified by his oath, to the marshal, who is expected to incorporate it in his own account against the United States, and to make it one of the vouchers to sustain it, and to swear that he believes all the items therein charged are correct and legal, and the amounts thereof are justly due to him as therein stated, the deputy may well be said to present, within the meaning of the statute, his account to the marshal for approval. The marshal adopts the verified accounts of his deputies, swears to his belief in their correctness, demands pay for them from the United States. He may, therefore, well be said to approve them. Without such approval the deputy could not take a step towards the collection of his claim against the government out of the treasury.

There are other grounds of demurrer to the first count, but they are either covered by what we have said, or allege defects or imperfections in matters of form only, which do not tend to the prejudice of the defendant, and are, therefore, not matters upon which the count can be held to be insufficient. Rev. Stat., sec. 1025.

In our opinion, the count avers, with all requisite certainty, the presentation by the defendant for approval to an officer in the civil service of the United States, with intent to defraud the United States, of a false, fictitious and fraudulent claim against the government of the United States, he well knowing the same to be false, fictitious and fraudulent. This covers every element of the offense described in the statute; it gives the defendant, as well as the court, notice sufficiently specific of the charge against him, and is sufficiently definite to enable him to plead his conviction or acquittal, should he ever again be indicted for the same offense.

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It is alleged, as ground of demurrer to the third count, in addition to the grounds urged against the first count, which we need not again particularly notice, that the presentation of the claim alleged in that count was a presentation to the district court of the United States, and to the Hon. John Bruce, district judge therein presiding, neither of which allegations are within the statute, because the district court is not a person or officer in the civil service of the United States; and the Hon. John Bruce, district judge, is not an officer to whom the claim in this count described can be lawfully presented for approval.

It is a presumption of the law that congress legislates with intelligent purpose and in view of the existing statutes. Before the passage of the act of February 22, 1875, heretofore mentioned, the accounts of marshals were required to be examined and certified by the district judge before they were presented to the accounting officers of the treasury (Rev. Stat., sec. 846), and if a deputy marshal presented a fraudulent claim against the United States to a district judge for his approval, he would have been liable to the penalties in section 5438, on which the indictment is founded. It is claimed, in behalf of defendant, that by the passage of the act of February 22, 1875, congress intended that deputy marshals should present their claims in open court for approval, and that the act allows them to present false, fictitious and fraudulent claims with impunity. We cannot believe that such was the purpose of this legislation, but that, on the contrary, it was to provide additional guards against the presentation of false claims.

The contention of the counsel for defense is that the law only punishes the presentation to a person or officer in the civil service of the United States of a false claim, and that when a false claim is presented for approval to the district court of the United States, in which the district judge is presiding, that that is not a presentation thereof to an officer in the civil service of the United States. In other words, that a United States judge, in vacation, and when not engaged in the discharge of his usual duties, is an officer in the civil

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service of the United States; but when engaged in holding a term of court, he ceases to be an officer in the service of the United States, and his identity as such is lost, and he is only a court or a member of a court. We think that a United States judge is at all times an officer in the civil service of the United States within the meaning of the statute, and that when a claim is presented to a court of which he is the presiding officer, it is presented to an officer in the civil service of the United States. The act of approval or disapproval required of the court is not a judicial, but only a *quasi* judicial act; for it is expressly made by the act of February 22, 1875, subject to the revision of the accounting officers of the treasury.

We think an examination of section 1 of the act of 1875 will show, by its own terms, that when an account is presented to the court for approval, the judge acts as an officer in the civil service of the United States as well as a court. The section is somewhat disjointed, but it declares in substance and effect that before any bill of costs in favor of clerks, marshals and district attorneys shall be taxed by a judge or other officer, it shall be presented to the district or circuit court, and that before any account in favor of the same officers, payable out of the treasury, shall be allowed by any officer of the treasury, it also shall be presented to the district or circuit court for approval. The taxing of a bill of costs is synonymous with approval of a bill of costs. By the express terms of the section under consideration, when a bill of costs is presented to a court, the judge taxes it. Now, if the contention of counsel for defendant is sustained, when an account in favor of the marshal, which is, or at least may be, a bill of costs, is presented for approval to the same court, the court alone acts, and the judge does not, so that this absurd result follows: that when a claim against the government is called a bill of costs, if it is a fraudulent bill, it is an offense against the law to present it for allowance; but if the same identical bill, no matter how false and fraudulent, is called an account, it may be presented to the court for

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allowance with impunity. A construction of the statute which leads to such a result cannot be sound.

Our conclusion is that section 1 of the act of 1875 was not intended to relieve from the penalties prescribed by section 5438, on which the indictment is based, any person who should present for allowance to a district or circuit court of the United States a false and fraudulent claim against the government, and that a presentation to the court, under the act of February 22, 1875, is, within the meaning of section 5438, a presentation to an officer in the civil service of the United States.

It is contended by counsel for the defendant that the account of a deputy marshal for his fees is not a claim against the United States; but in the first count, the account presented to the marshal for approval, and, in the third count, the account presented to the district court for approval, are both averred to be accounts in favor of George Turner, the then late marshal, and not accounts in favor of the deputy marshal.

The grounds of demurrer to the second and third counts of this indictment are identical, the counts themselves being in all respects similar. All the grounds except one are based on the alleged uncertainty of the counts. Without going into a discussion of them, we are of opinion that the counts aver with requisite certainty all the elements of the offense which they are intended to charge. They aver, in the language of the statute, that the deputy marshal, as aforesaid, for the purpose of aiding to obtain the payment of the claim aforesaid, which had been particularly described in the previous counts, did use a false affidavit of the correctness of said claim, he knowing the same to contain certain false, fraudulent and fictitious statements and entries, which are set out *in hæc verba*.

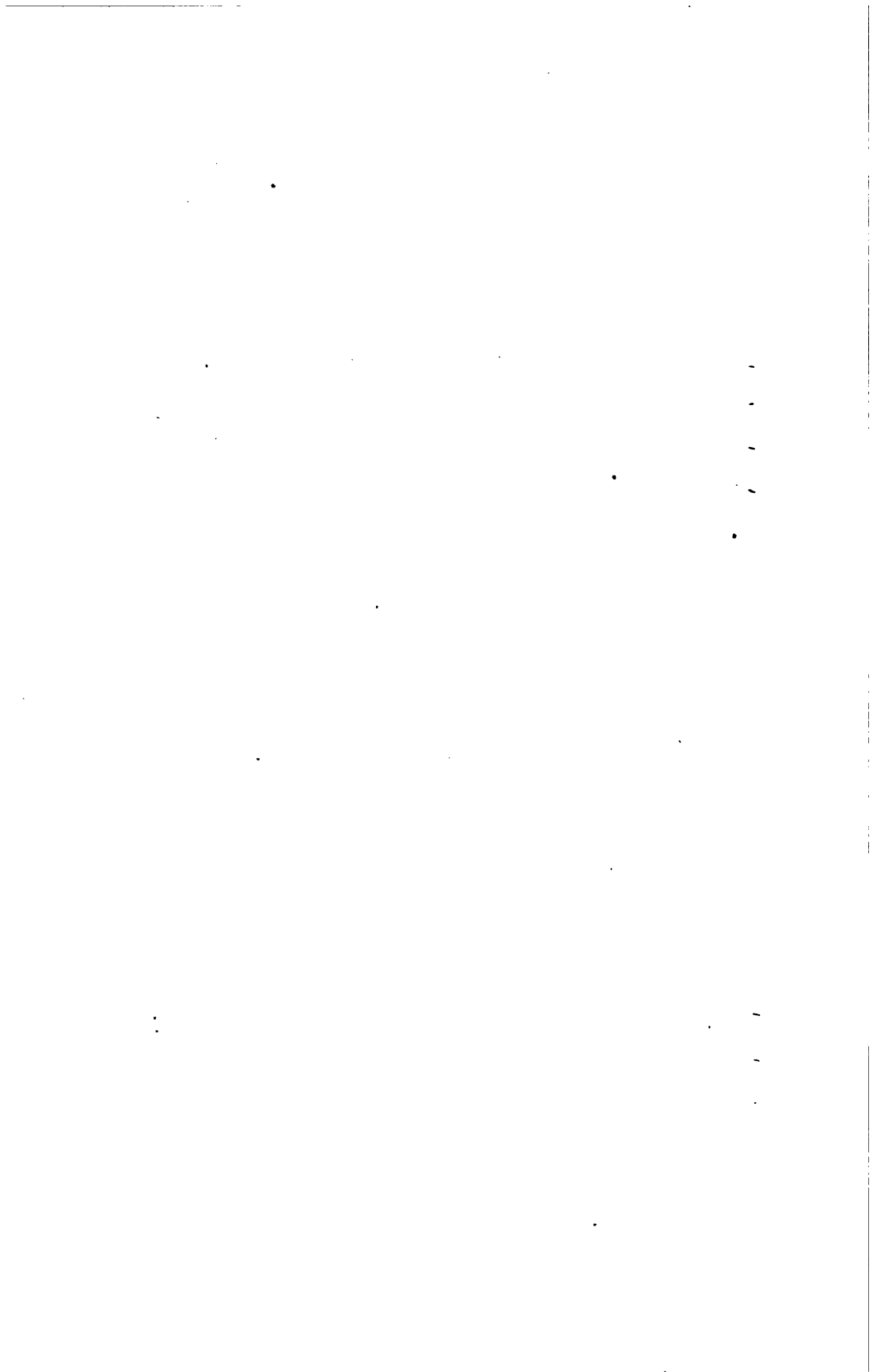
The remaining objection to the counts under consideration is that they do not aver that the said false claim was ever presented for payment to or by any person or officer in the civil, military or naval service of the United States. This

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ground of demurrer, we are of opinion, is not well taken. The words of the statute upon which these counts are based, of themselves, fully, directly and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The counts under consideration aver all these elements with a requisite certainty and particularity. It is not, therefore, necessary to make any other averments. *United States v. Carl*, 105 U. S., 611. .

Section 5438, on which all the counts of this indictment are founded, is a broad and comprehensive enactment. It is intended to punish the presenting for approval or payment of any false and fraudulent claim against the United States to any person or officer in any branch of the service of the United States, or the use of any false receipt, voucher, account, certificate and affidavit, to obtain or aid in obtaining the approval or payment of any false and fraudulent claim. The elements of the different offenses described in the statute lie within narrow limits. We are of opinion that the several counts of this indictment sufficiently describe these offenses, and sufficiently charge the defendant. Our conclusion, therefore, is that the demurrer to the indictment and the several counts thereof should be overruled, and it is so ordered.

BRUCE, District Judge, concurred.



NORTHERN DISTRICT OF ALABAMA.

OCTOBER TERM, 1877.

HUGH L. CLAY, ASSIGNEE, v. THOMAS S. MCCALLY ET ALS.

1. M., who was insolvent, conveyed to L., the mother of his wife, substantially all his property which was subject to execution, the alleged consideration being the payment of an account due from M. to L. Within two days thereafter, L., in consideration of natural love and affection, conveyed the same property to her daughter, the wife of M. *Held*, that these circumstances were indications of bad faith, and the deed executed by M. to L. could be sustained only on the ground that it was made for a valuable consideration and to pay an honest debt.
2. The consideration for the conveyance made by M. to L., mentioned in the first head-note, was an account said to be due from M. to L. for more than \$42,000. The account had been running for twenty-three years; no demand for the payment of it or any part of it had ever been made; some of the items were such as showed conclusively that their amount had been guessed at; others were for rent of land which L. did not own, but had previously conveyed to the wife of M., and for all it was evident that L. had not considered M. her debtor; no part of the account had ever been reduced to writing, and it was stated for the first time on the day the conveyance was made. *Held*, that the account was trumped up and fraudulent, and would not sustain the conveyance.
3. A gratuity cannot subsequently be converted into a debt so as to become the consideration of a conveyance made by the grantor to the injury of his creditors.

IN EQUITY. Heard for final decree on the pleadings and evidence.

The facts were as follows: On May 15, 1866, Thomas S. McCally, by his deed of that date, conveyed to his mother-in-law, the defendant Ann E. Langford, certain real estate, to wit: Nineteen acres and the undivided fourth of one hundred and thirteen and one-half acres in fee simple, and his life

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estate in the remaining three-fourths of said one hundred and thirteen and one-half acres, and his life estate in five hundred and forty-three acres, all situate in Madison county, Alabama. The personal property consisted of the following goods and chattels, to wit: Live stock, farming utensils and household furniture. The property so conveyed was worth about \$10,000, and included nearly all his property subject to execution in Alabama. The consideration of this conveyance, as expressed in the deed, was a debt due from McCally to Mrs. Langford of \$42,904.45. Within two days after said conveyance, Ann E. Langford conveyed the same property to the defendant Catharine M. McCally, who was her daughter and the wife of Thomas S. McCally, the consideration expressed being natural love and affection.

On March 17, 1868, McCally was adjudicated a bankrupt by the district court for the northern district of Alabama, and complainant was appointed the assignee of his estate. After appropriating all the assets that came to the hands of the assignee, there remained due to the creditors of the bankrupt estate more than \$40,000.

At the time of executing the conveyance to Mrs. Langford, McCally was insolvent.

The debt which was the consideration of the deed from McNally to Mrs. Langford was evidenced by an account which purported to have been stated on the day the deed bore date. The debt due Mrs. Langford, as shown by the account, was for her share of four crops of cotton raised by McCally jointly with her in the years 1843, 1844, 1845 and 1846, and for rent of lands and hire of negroes from 1847 to 1862 inclusive.

McCally had been a merchant, carrying on business from 1840 to 1861. There was no entry of the items of this account in any book kept by him, nor in any book kept by Mrs. Langford.

The land for which rent was charged was that allotted to Mrs. Langford as dower in lands of which her husband had died seized. She had relinquished all except one hundred

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and twelve acres at the time of its assignment on March 3, 1843, and in 1856 had conveyed this one hundred and twelve acres to Thomas S. McCally's wife.

The bill charged that the conveyance from McCally to Mrs. Langford was not *bona fide*, but on the contrary, was made fraudulently with intent to hinder, delay and defraud the creditors of McCally. The prayer of the bill was that said deeds be set aside, and the property conveyed thereby be declared to be assets of the bankrupt estate and turned over to the assignee to be administered as such.

Messrs. David P. Lewis, S. D. Cabiniss and F. P. Ward, for complainant.

Messrs. L. P. Walker, D. D. Shelby and Paul L. Jones, for defendants.

Woods, Circuit Judge. The defendant Thomas S. McCally, as appears clearly from the evidence, on or about May 15, 1866, conveyed substantially all the property of which he was seized or possessed subject to execution in Alabama, to his mother-in-law, Mrs. Langford, to pay an alleged debt due to her from him of over \$42,000. The property so conveyed consisted of the live stock and farming implements on his plantation, and the plantation itself, and the house in which he with his family resided and the household furniture therein.

In the fall of 1865, McCally had invested \$13,000 in the bonds of the Memphis & Clinton Railroad Company and distributed them among his children, several of whom were minors, and in the year 1866 he had expended on the lands conveyed by him to Mrs. Langford the sum of \$13,000.

Within two days after the conveyance to Mrs. Langford, she conveyed, for the consideration of natural love and affection, the same lands and property to her daughter, the wife of McCally, by a deed which left him no interest therein which could be seized to pay his debts.

The circumstances which surround these conveyances are certainly suspicious. The deed to Mrs. Langford can be sus-

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tained, if at all, only on the ground that it was made for a valuable consideration and to pay an honest debt due by the grantor to the grantee.

Was there any such indebtedness as the deed recites?

The account consists of charges for Mrs. Langford's share of cotton produced by her jointly with McCally in the years from 1843 to 1846 inclusive, for stock and plantation tools bought of her by McCally, and rent of land and hire of slaves from 1847 to 1862 inclusive.

The account amounts to over \$42,000. A most remarkable fact about it is, that no statement of the account or any part of it was ever made until May 15, 1866. Neither McCally nor Mrs. Langford, during the entire time which the account covered, from 1843 to 1866, a period of twenty-three years, ever put a single item of it in writing. Until May 15, 1866, there was no memorandum, entry, account, note or other scratch of a pen to show that McCally owed Mrs. Langford any amount, or that she claimed any amount from him.

The first four items of the account are for the share of Mrs. Langford in the cotton crop produced by her and McCally jointly in the years 1843, 1844, 1845 and 1846. The account states her share at twenty thousand pounds each year, and the price at six cents per pound each year. That such an account is correct is incredible. That it is fabricated is clear. If McCally ever received the proceeds of any cotton produced in the years named, the property of Mrs. Langford, which it is unnecessary to deny, it is clear that no account was ever made of it, and the amount of the cotton and the price at which it was sold was guessed at, when the account stated was made up in 1866, after the lapse of twenty years.

The items of the account for the hire of negroes are open to similar objections. These items cover the period from 1847 to 1862 inclusive. It is not pretended that any account has been kept of these charges. No memoranda of these large items, running over a period of fifteen years, was ever made

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either by McCally or Mrs. Langford; nor is there a word of evidence to show that any contract of hiring was made which specified the number of slaves to be hired, or the price to be paid for their services, or any of the usual terms embodied in such contracts. The only hint that looks like a contract is the statement of McCally that in 1847 he hired the slaves referred to in the account. What this hiring really was, is made evident from the will executed by Mrs. Langford on October 7, 1864. In that will, after dividing her slaves between her two daughters, Mrs. Thomas S. McCally and Mrs. Wm. J. McCally, who were her only children, she declares: "I also direct and request, if desired by either one of my daughters, that an account current shall be made out for the hire of above negroes, including those that are dead, for the year 1847, being the year that I hired or let them have the negroes, taking into consideration the breeding and raising of young negroes, either one having to pay the other, that the balance may be against."

This clause in the will makes it perfectly clear that in 1847 Mrs. Langford divided her slaves between her daughters and let them each have a portion of them, and that it was not her purpose to demand compensation for the hire, but that she intended their use to be a gratuity or something in the nature of an advancement to her daughters.

It is utterly inconsistent with the pretense now set up, that from 1847 to 1862 there was a contract between Mrs. Langford and Thos. S. McCally, by which she hired to him, for a compensation to be paid her by him, the slaves referred to in the stated account.

The items for rent of land are also open to criticism. In the first place, Mrs. Langford is credited with the rent of two hundred and thirty-five acres of land, when she only had one hundred and twelve acres to rent, and she is credited with rent of land year by year up to 1862, when she had, in 1856, conveyed the identical lands to her daughter, Mrs. McCally.

It is not pretended that there was any contract between
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Mrs. Langford and McCally by which the amount of rent to be paid was agreed on. None of the terms of the contract were settled between them, even verbally.

It is perfectly clear from the evidence what were the dealings between Mrs. Langford and McCally. Mrs. Langford, during the period which the stated account covers, lived with her daughters, Mrs. Thos. S. McCally and Mrs. Wm. J. McCally, spending about half the time with each. No account appears to have been kept or charges made against her for subsistence. On her part, she appears to have been liberal and generous to her daughter, Mrs. Thomas S. McCally, and her daughter's husband. It is incredible that she ever expected to exact payment from McCally, or that he ever expected to make payment for the various items set out in the account stated, when we consider that no specific contract was ever made between them, even by parol; that no account of any sort was kept by either of the parties; that for a period of twenty-three years no demand was ever made by Mrs. Langford for payment of the amount now claimed to be due her, or any part thereof. From January 1, 1844, to May 15, 1866, no memorandum was made by either Mrs. Langford or McCally, and no word passed between them that would indicate any indebtedness by the latter to the former; and Mrs. Langford, out of regard for her daughter, who was the wife of McCally, seems to have allowed McCally to use the proceeds of her cotton, and to use her land and slaves to carry on his business and support his family without any purpose of ever demanding compensation therefor, and with no expectation on the part of McCally that pay would ever be exacted. After the lapse of many years, when McCally had become embarrassed in his circumstances, evidently with the purpose of saving his visible and tangible property from execution by his creditors, the plan is conceived of stating an account between him and Mrs. Langford.

The account shows on its face that it is an afterthought. No one reading the evidence would suppose for a moment

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that if McCally had not become embarrassed, and if there had not appeared to be a necessity to shield his property from execution, Mrs. Langford would ever have made out the account, or ever demanded payment, or that she ever expected to demand of McCally to make payment.

If she had sued McCally to collect the amount claimed to be due her (as shown by the stated account), and he had pleaded the general issue, the evidence in this case would have made his defense complete and perfect.

There was no debt due to Mrs. Langford from McCally; the deed to her from him was therefore without consideration.

The case is full of the evidence of bad faith. The device by which McCally put his property in the name of his wife, and beyond the reach of his creditors, is transparent. It is seldom that a clearer case of a fraudulent conveyance is brought to the attention of a court of equity.

There must be a decree in accordance with the prayer of the bill.

MAY TERM, 1881.

BRIDGFORD V. THE CITY OF TUSCUMBIA.

1. The rights of creditors of a municipal corporation cannot be prejudiced by the neglect of its council to keep proper minutes of their proceedings. What the council in fact did may be shown by evidence *aliunde* its record.
2. When the common council of a city had practically agreed upon the purchase of a fire engine, the fact that the mayor was paid by the seller for circulating among the tax-payers a petition in favor of the purchase, there being no concealment, and no corruption being shown, did not avoid the sale.

This was an action at law brought on three promissory notes made by the city of Tuscumbia for \$750 each, and

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duly executed by the proper officers under the seal of the city. The consideration of the notes was the sale to the city of a chemical fire extinguishing engine.

The pleas were, (1) *non est factum*; (2) that the city never purchased the engine for which the notes purported to have been given, and (3) failure of consideration.

The parties waived a jury and submitted the cause to the court on the issues of fact as well as of law.

It appeared by the evidence that the price of the engine and terms of sale were submitted to the council, and were satisfactory, but were not finally accepted, it being suggested that the sense of the tax-payers should be taken before the contract was finally closed.

The vendor thereupon agreed in the presence of the council to give the mayor \$25 as a compensation for his time and labor to be expended in circulating a petition favoring the purchase of the engine. The mayor circulated the petition, taking pains to publish the fact that he was to be paid therefor. The other facts sufficiently appear in the opinion of the court.

Messrs. L. P. Walker, D. D. Shelby and L. B. Thornton, for plaintiff.

Messrs. Wm. Cooper and R. B. Lindsey, for defendant.

PARDEE, Circuit Judge. The argument in this case has taken a wide range—much wider than is necessary for the decision of this case. There can be no doubt at all, under the facts in this case, that the mayor and board of aldermen of the city of Tuscumbia purchased the engine, and incurred the several obligations to pay the same, for and on account of the city of Tuscumbia. They had the authority to make the purchase. *Mayor of Birmingham v. Rumsey*, 63 Ala., 352; 1 Dill. Mun. Corp., secs. 93, 94, pp. 210, 211. See Charter, Acts Ala., Sess. 1865–6, p. 191. As they had the authority to make the purchase, they of course had the authority to obtain terms and enter into the necessary contracts, provided they were not restricted in that behalf by

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their charter, which is not claimed in this case. See *Trustees of University v. Moody*, 62 Ala., 389.

The burden of proof is on the defense to show the want of consideration pleaded. This has not been shown; on the contrary, from the weight of evidence in the case, I am satisfied that the engine in controversy, when taken care of and handled by a capable person or persons, is a valuable machine, and can be of great assistance in the extinguishment of fires. These conclusions would seem to dispose of the case, but the counsel for the defense have strenuously and learnedly urged two propositions to defeat the plaintiff's demand that I have no hesitation in passing upon. It is said that the acceptance of the contract by the mayor and board of aldermen cannot be shown save by the minutes in writing of the meeting at which the acceptance was ordered, and as such record shows no meeting, none can be proved.

In 1 Dillon on Municipal Corporations, section 237, it is said:

"But a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matter to appear of record, and makes the record the only evidence." See, also, *Bank, etc., v. Dandridge*, 12 Wheat., 64.

The rights of creditors or of third persons cannot be prejudiced by the neglect of the council to keep proper minutes, against the corporation. What the council in fact did may be shown by evidence *aliunde* the record kept by it. *Bigelow v. City of Perth Amboy*, 1 Dutch., 297; *San Antonio v. Lewis*, 9 Tex., 69; *Trustees of St. Mary's Church v. Cagger*, 6 Barb., 576.

The case of *Perryman v. Greenville*, 51 Ala., 507, does not conflict with these propositions. The corporation in that case proved, by its record of proceedings, that a certain allowance claimed by the defendant, one of its officers, was not made by the council, and the supreme court held the

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records or minutes admissible, saying that they were the best and only evidence of the fact that such an allowance had or had not been made. My attention has been called to no Alabama case supporting the defendant's pretensions in this regard. The other proposition argued is that as Fitch, agent, paid the mayor \$25 for circulating the petition for the purchase of an engine among the tax-payers, that it amounted to lobbying and corruption, so as to taint with illegality the contract of purchase; relying on *Trist v. Child*, 21 Wall., 441.

A sufficient answer to this is that no such defense is pleaded in the case; but I deem it proper to say that the evidence shows that the agreement to pay the mayor for circulating the petition was after the purchase had been practically agreed upon by the board of aldermen, and no intention to corrupt any one, and no actual corruption, appears or can be fairly inferred from all the facts in the case. On the whole case, I am satisfied that plaintiff is entitled to judgment for the amount of notes sued on, principal and interest, and as a jury has been waived and the case submitted to the court, such judgment will be entered, with costs.

OCTOBER TERM, 1881.

BROWN v. WHITE, ASSIGNEE.

1. Upon a bill of review the court will not consider errors of fact.
2. The jurisdiction of the circuit courts of the United States of a bill in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest in property vested in such assignee, is not affected by the act of June 22, 1874, amendatory of the bankrupt act.
3. When there is a decree for complainant, all the issues raised by the pleadings, although not noticed in the decree, will be considered as decided in favor of complainant.
4. A decree will not be reversed upon bill of review for errors by which the complainant in review was not damaged.

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Heard on demurrer to bill of review.

Messrs. John D. Brandon and Paul L. Jones, for complainant.

Messrs. S. D. Cabiniss, F. P. Ward and D. P. Lewis, for defendant.

PARDEE, Circuit Judge. The facts of the case as they are set forth in the bill are too complicated and numerous to recapitulate. There can be no question that the bill, answer, replication and proceedings in the original cause are proper subject matter for revision in a bill of review. Story's Eq. Pl., sec. 407, and authorities there cited. But proceedings to be reviewed do not include the evidence. *Whiting v. The Bank of the United States*, 13 Pet., 6. Therefore, so far as the bill in this case assigns errors in the original case arising out of alleged erroneous conclusions of the court from the evidence in the case, the demurrer is certainly well taken.

The errors of law alleged by the bill of review to be apparent on the face of the proceedings in the cause sought to be reviewed are as follows: (1) Want of jurisdiction in the court; (2) that the decrees in the case do not pass upon and decide the question of limitation of two years, set up in the original answer; (3) that the complainant in the original bill was allowed, after replication filed and first decree rendered, and master's report filed, to amend his bill without notice, and without delay given to answer the amendment.

The question of jurisdiction is settled by sec. 4979, Rev. Stat., which gives the circuit courts of the United States concurrent jurisdiction with the district courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

The act of June 22, 1874, does not affect the jurisdiction of the circuit courts of the United States, said act being directed against the jurisdiction of the state courts in matters affecting the bankrupt or his estate.

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Therefore it is not necessary to consider the point argued, as to whether the court in considering a bill of review is bound to notice a want of jurisdiction in the court as to the proceedings in the original cause.

As to the second error alleged — the failure of the court in the original cause to pass upon the limitation of two years pleaded in bar of the action — a good deal might be said.

The original bill alleged possession of the lands in question in the complainant. The answer denied possession by the complainant, alleging possession to be in the respondent, and pleading that the complainant was barred by the statutes of limitation of two years.

Both decrees rendered in the case were adverse to the then respondent, now complainant, in the bill of review. Whether the statute pleaded was a bar, was a matter to be ascertained from the evidence before rendering decree. It would seem that in such a case the question ought to be considered, or decided and disposed of by the decree, although not therein formally recited. The fact is that in the decree rendered no issue is recited as passed upon,— not even the question of fraud, which was the main ground of the action.

The third error assigned is still more serious. The record shows an amendment allowed after replication and decree, on five days' notice, claiming rents and profit on another tract of land than that embraced in the original bill, waiving answer and service, and a final decree rendered three days after, charging defendants with rents on such additional tract.

The letter of the twenty-ninth equity rule was probably followed, but it requires a good deal of stretching to make it cover the amendments allowed in the cause sought to be reviewed.

If this were all the case I should have some trouble to sustain the demurrer filed herein. But an inspection of the bill of review shows that neither of the decrees, nor any of the proceedings in the original cause, have really prejudiced the defendant therein, or damaged him to the extent he ought to have been condemned.

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The bill of review shows that while in the original proceedings the complainant claimed under a deed from a married woman, conveying her statutory separate estate, to which deed the husband was no party, the decree rendered did not decree the deed void, but adjudged it a mortgage in favor of complainant for a large sum, and gave the assignee in bankruptcy of the husband, who had been adjudged the real owner by the state chancery court, a right to redeem.

Now, counsel on both sides concede in their briefs, in fact urge, that said deed was absolutely void, in which case complainant here had no title whatever. The authorities cited fully sustain this position, if that could be considered doubtful law which is conceded by both sides to the controversy. See *Ellett v. Wade*, 47 Ala., 456; *Coleman v. Smith*, 55 Ala., 368; *Weil v. Pope*, 53 Ala., 585; *Jones v. Wilson*, 57 Ala., 122; *Conner v. Williams*, id., 131. From this it is perfectly clear that the proceedings which complainant seeks to have reviewed and reversed have not aggrieved him.

In the case of *Whiting v. Bank of United States*, 13 Pet., 6, the supreme court of the United States decides that "no party to a decree can, by the general principles of equity, claim the reversal of a decree upon a bill of review, unless he has been aggrieved by it, whatever may have been his right to insist upon the error at the original hearing or on an appeal."

As by the decrees rendered complainant recovers a sum of money, when it is apparent the overshadowing error in the proceedings, if any exist, was in not condemning him at least to receive nothing, he cannot be heard to demand a review. It is in his power now, without troubling the court, to do substantial equity in the premises, by declining to receive the six or seven hundred dollars awaiting him, and donating it to the creditors of Gardner, bankrupt, who have the most right to complain.

The statement in complainant's brief, in relation to the assignment by the assignee to Newman of rights to the sixty-seven acre tract, referred to in the master's report, and amendments allowed to the original bill, and the litiga-

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tion pending in relation to such tract in the state courts, is matter outside of the bill in review, and is of course immaterial in this case.

Let the demurrer be sustained with costs.

ADAMS AND ANOTHER V. CRITTENDEN AND OTHERS.

1. An injunction allowed before the issues are made up or any testimony taken will be considered an injunction *pendente lite*.
2. When property of a bankrupt has been sold by order of the bankruptcy court, and its proceeds have been received, and neither the assignee nor the creditors have any further interest therein, and the bankrupt has been discharged, the district court sitting in equity will not interfere by injunction at the suit of the purchaser to prevent strangers to the bankrupt proceedings from enforcing in a state court their liens against the property sold, even though final distribution of the bankrupt's assets has not been made.

IN EQUITY. Appeal from the district court. Heard upon pleadings and evidence for final decree.

Messrs. Ed. A. O'Neal and Emmett O'Neal, for complainants.

Messrs. Milton Humes, Geo. S. Gordon and Sheffey, for defendants.

PARDEE, Circuit Judge. The petition in this case was filed in the district court to enjoin the defendants Crittenden and Weaver from further prosecuting or enforcing their suits or claims against certain lands in the state chancery court for the second district of the northern chancery division of Alabama, and to enjoin the defendant Andrews, register of aforesaid chancery court, from advertising and selling said lands under order of said chancery court. The petition, which is lengthy, sets out in substance that the lands described formed part of the assets belonging to one Weaver, who had been compelled by the judgment of the district court to make a surrender in bankruptcy, and so, after certain litigation, passed into the hands of Harris, assignee of

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said Weaver, with certain real and fictitious liens upon them, who, under a proper order and decree of the district court, sold and conveyed them to Adams, plaintiff; that after the sale made in bankruptcy the defendants Crittenden and Weaver; claiming to have vendors' liens upon the land in question, are seeking to enforce them against the property in the state chancery court, and have prosecuted their claims to judgment, and are about to cause the lands to be sold under the decree obtained. The state court is alleged to be wholly without jurisdiction by reason of the provisions of the bankrupt law of the United States; and the defendants are alleged to be violating the jurisdiction of the district court of the United States; and that the proceedings will damage plaintiffs by throwing a cloud on their title. The record shows that the sale made by the assignee in bankruptcy has been completed and ratified by the court, and the proceeds thereof received by the assignee; that a final discharge has been granted the bankrupt, but no final distribution has been made, and to that extent the bankruptcy proceedings may be considered as still pending.

It further appears that the prayer of the petition was for an injunction to issue, and that, upon the hearing, the injunction should be made perpetual. The petition was filed on the 12th day of April, 1879. On the 4th day of May following, defendant Crittenden filed demurrer and answer. On the 5th day of May, defendant Weaver filed demurrer and answer; and on the same day the district judge made this order:

"This cause having come on to be heard, and after argument by counsel and consideration by the court, it is ordered, adjudged and decreed that the clerk of this court issue the writ of injunction in accordance with the prayer of the petition aforesaid."

Thereupon, May 7, 1879, the clerk issued an injunction containing an order for the defendants to show cause at the next term of the court why the same should not be made absolute, which was served. November 4, 1879, the defendants

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filed, on many grounds, a motion to dismiss the petition and dissolve the injunction. Afterwards, on the 16th of December, the motion to dissolve was heard and denied by the judge. Finally, on February 24, 1881, the district court rendered a judgment, finding for the defendants, and decreeing "that the petition for injunction or restraining order be denied and the same is dismissed, and the temporary injunction heretofore granted by the court upon the petition is hereby dissolved;" and from this judgment the plaintiffs have appealed to this court.

The first question in proper order presented in this court, necessary to pass upon, is whether the injunction granted May 5, 1879, was or not a temporary injunction, or whether the order or judgment rendered that day was not final on its merits, ordering and perpetuating the injunction in the same decree. In the record there is no notice to defendants for application for injunction, though, as they appeared and filed demurrers and answers, they must have had notice. Nor in the record, until the day of the final decree, is there anything to show but the plaintiffs had always taken and treated the injunction as temporary.

So that it may be considered that up to the final decree all the parties, and the judge himself, held and treated the first injunction as temporary only. The terms of the injunction are to that purport. At the first hearing it does not appear that any evidence was taken or considered. It was neither regular nor proper to have issued a perpetual injunction at that stage of the case. That no bond was required proves nothing, as that was, considering the injunction as a restraining order merely, within the discretion of the court.

Under these circumstances, I do not well see how this court can declare that a perpetual injunction which was neither so in terms nor in intention.

The only remaining question of the many raised and ably argued, necessary to decide, is whether the district court of the United States sitting in bankruptcy, and undoubtedly having exclusive jurisdiction against the state courts over all

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questions relating to the ascertainment and liquidation of the liens and specific claims bearing on the bankrupt's assets, and extending to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy, will, after property of the bankrupt has been sold and the proceeds received, and neither the court nor the assignee nor creditors have any further interest in it, interfere at the instance of the purchaser to prevent, by injunction, parties, strangers to the bankruptcy, from asserting any claims they may have, or pretend to have, against the property, in any of the courts of the several states, and this, notwithstanding no final distribution has been made in the bankruptcy.

It would seem that this question as stated would suggest its own answer. Because one court has exclusive jurisdiction of a matter, it does not follow that it will enjoin parties from proceeding or attempting to proceed in some other forum. There can be no question that the United States district courts have exclusive original jurisdiction in admiralty; but those courts do not issue injunctions to hinder the state courts from infringing on their jurisdiction. There is a remedy in another direction, and the same remedy, it seems to me, can be, unless lost by delay, resorted to by the parties in this case.

The reasoning of Judge Hill, in the case of *Penny v. Taylor*, 10 N. B. R., 200, is applicable in full force to this case. The rights of the parties, under the laws of the United States and the decrees of the district court of this district, are well ascertained and determined, and every court in the country is bound to, and, it is presumed, will, maintain them. If not maintaining them to the satisfaction of the parties, the remedy would lie, not by an injunction from another court, but by appeal to the proper superior court, and, finally, to the supreme court of the United States, if justice were not sooner done in the premises.

If the property in controversy were in anywise under con-

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trol of the bankrupt court, or in anywise affected the bankrupt estate, it would be decidedly different. But the bankrupt court is not for all time, or any time, a warranty of title to property sold, disposed of, and paid for under its orders.

The case of *Hewitt v. Norton*, 1 Woods, 68, was a case where the property was in the hands of the assignee. No other conclusion can be arrived at from an examination of the whole case.

The authorities quoted in Bump, Bankr. (9th ed.), 177, note 4, to the effect that the bankrupt court will not interfere where no advantage can result to the bankrupt's estate, gives, in my judgment, the proper rule to follow in cases like the one under consideration.

The argument that, unless the bankrupt court protects property after it has passed out of the bankruptcy, the power of the court and the efficiency of the law will be impaired, if not brought into contempt, is not very forcible. The jurisdiction of the courts of the United States, under the laws of the United States, is well grounded, and, wherever necessary, will be vindicated; and for that very reason it behooves the said courts and the judges thereof to exercise care and comity when called upon to interfere with the proceedings in state courts, which courts are presumed to know and apply all the laws of the country with learning and justice.

There is another view of this case which is equally against the plaintiff in this suit. The district court has no jurisdiction, exclusive or otherwise, to interfere, under the bankrupt law, except with such matters and things, liens and otherwise, as pertain to the assets of the bankrupt's estate. Now, when property of the bankrupt has been brought into the bankrupt court, sold under the decree of the court, the proceeds received by the assignee, and the sale ratified by the court, that property has ceased to be assets of the bankrupt, ceased to pertain to his estate, and ceased to be under control of the bankrupt court, just as much as it would have passed out of the jurisdiction of any other court that

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might have had judicial possession of it, and ordered and completed its sale.

Can it be pretended that an admiralty court, after having possession and control of a ship, and after selling it free and clear of all liens, as against all the world, can prevent parties with alleged liens pursuing the ship in the hands of the purchaser in any other courts; or that a probate court, having the exclusive control and jurisdiction of a minor's property, can protect it, after sale, from alleged mortgages and liens? It would seem immaterial whether the debts, which are the basis of the alleged liens claimed by defendants, were the debts of the bankrupt Weaver or not; but, in fact, they are not his debts, but the debts of strangers to the bankruptcy, and were not provable in said bankruptcy, although the liens might have been allowed therein. The views of this case as herein expressed, or others leading to the same conclusions, were undoubtedly entertained by the learned judge presiding in the district court, who decided the case adversely to the pretensions of the plaintiff.

Let a decree be entered affirming the decree of the district court.

NORTHERN DISTRICT OF FLORIDA.

JACKSONVILLE, DECEMBER TERM, 1878.

SAMUEL A. SWANN ET ALS. V. WINTON A. SANBORN, ASSIGNEE,
ET ALS.

- 1 The district court has jurisdiction of a bill in equity brought by creditors of an alleged firm against the assignee in bankruptcy of one of the individuals said to compose the firm, seeking by the subject to the payment of the firm debts, assets held and claimed by the assignee as the individual property of the bankrupt, although both the complainants and the assignee are citizens of the same state.
2. Creditors who have not reduced their claims to judgment and have no lien have no right to insist on payment out of any specific property of their debtor.
- 3 One who is not in fact a partner in a firm cannot be made such as to third persons by the acts or declarations of his alleged partners of which he has no notice.
4. S. loaned money to C. to be invested in business by him, and agreed to take in lieu of an interest therein a certain share of the profits of the business. *Held*, that persons who became creditors of C. after this arrangement was ended, and who had never heard of it, could not hold S. as a partner.
5. C. owned all the property by which a business was carried on, but, with his knowledge, two other persons held themselves out as his partners in the business, though they were not in fact such. *Held*, that these representations did not divest C. of his exclusive title to the property, and his individual creditors were entitled to have it applied first to the payment of their debts.

IN EQUITY. Appeal from the district court.

The bill was filed by Samuel A. Swann and others, claiming to be creditors of a partnership which, it was alleged, carried on the business of manufacturing lumber, and which, it was alleged, was composed of F. S. Chester, the bankrupt, E. N. Chester, Franklin E. Town and Horace Stillman.

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The facts as disclosed by the evidence were as follows: Horace Stillman, a retired business man of fortune, residing in Buffalo, New York, was applied to by F. S. Chester, who also resided in Buffalo and who had married Stillman's niece or adopted daughter, for a loan of money with which to start the business of manufacturing lumber at some point in this state. One purpose of F. S. Chester in desiring to engage in the enterprise was to afford occupation and give an opportunity for a start in business to his younger brother, E. N. Chester, and his brother's friend, Franklin E. Town. Stillman promised to advance the money to F. S. Chester as requested.

In September, 1871, Town came to Fernandina, Florida, and there bought a saw mill, engine and machinery, for which he paid with funds furnished to F. S. Chester by Stillman, and took a bill of sale therefor in the names of F. S. Chester and Stillman. In November, 1871, E. N. Chester, the younger brother of F. S. Chester, came to Fernandina, and on December 7, 1871, he and Town procured of one Peter Cone a twenty years' lease of a small tract of land on which to erect their mill. This lease was made to F. S. Chester and Horace Stillman, as composing the firm of Chester & Co., of the city of Buffalo, New York, and embraced six acres of land, with a yearly rent reserved of \$100, with the right to purchase the fee simple for the price of \$600. This lease was at once placed on record in the proper office in Nassau county, where the demised premises were situate.

The two young men opened an office in Front street, Fernandina, over which they placed a sign with the firm name of Chester & Co., and proceeded to erect their mill upon the land leased from Cone.

E. N. Chester had a written contract with F. S. Chester, dated January 15, 1872, by which E. N. Chester agreed to take charge of such part of the saw mill business carried on by the said F. S. Chester, on Bill's Run, in Florida, as the latter should commit to him, and give his time and attention thereto for the period of five years, in consideration of which

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F. S. Chester agreed to pay him "a sum equal to the one-fourth part of the net profits of the business, such payment to be made on the 11th of April annually, and to advance him \$100 per month on the first day of every month."

The agreement provided that the same should not vest in said E. N. Chester any title or claim to the mill or property or business connected therewith. F. S. Chester made a contract in similar terms with Franklin E. Town, who took charge of the running of the mill, while E. N. Chester conducted the office business in Fernandina.

In the course of the business E. N. Chester drew bills in the name of Chester & Co. on F. S. Chester, in Buffalo, N. Y., all of which were paid by him.

Before the purchase of the mill and machinery the defendant Stillman had loaned to F. S. Chester various sums, amounting in all to \$20,000, for the purpose of establishing and carrying on the business, and these sums were used for that purpose.

In January, 1872, the defendant Stillman came to Fernandina and examined the mill and other property, and on April 11, 1872, the defendant F. S. Chester executed and delivered to defendant Stillman a chattel mortgage upon the former's interest in the mill site and upon the mill building, engines, etc., to secure the payment to him of the sum of \$15,000. This mortgage was duly recorded in the proper office of Nassau county, Florida.

During the visit of Stillman to Fernandina in January, 1872, he learned for the first time that the lease from Peter Cone had been made to him and F. S. Chester jointly as partners. He at once declared that the statement implied by said lease, that he was a party to the lease or a partner of F. S. Chester, was false. E. N. Chester promised defendant Stillman to inform Cone of the falsity of said statement in the lease, and to get Frank S. Chester to make and Cone to accept a surrender and cancellation of the lease, and to induce Cone to make and F. S. Chester to accept a new lease of the premises, and to have the cancellation and new

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lease put on record. This promise was fully performed, except that the new lease and the cancellation of the old lease were not put on record. These papers, however, were delivered to E. N. Chester to be by him put on record in the proper office, and some time afterwards E. N. Chester informed Stillman that they had been so recorded.

On April 11, 1872, Stillman took from F. S. Chester his bond of that date for \$6,000, money loaned and to be loaned by him to F. S. Chester. This sum was in addition to the \$15,000 before mentioned secured by mortgage. This bond recited that F. S. Chester proposed to pay said \$6,000 within the period of five years, and in lieu of interest thereon to pay Horace Stillman a sum equal to one-fourth part of the net earnings, gains and profits of said saw mill and business, while said principal sum of \$6,000 should remain unpaid.

This appeared to have been a temporary arrangement, for in November following this bond was given up, and F. S. Chester executed and delivered to Stillman his notes for the amount. In October, 1872, there was due to Stillman from F. S. Chester, for money loaned, the additional sum of \$8,000. This was secured by a mortgage from F. S. Chester to Stillman on the mill property, duly recorded and dated in October, 1872. First and last, Stillman loaned to F. S. Chester sums amounting in the aggregate to \$30,000. He never received payment of any part of this sum, or of any interest thereon, in any manner or shape.

The business was carried on by E. N. Chester and Town with no profits, but at considerable loss, until the winter of 1872-73. Supplies of various kinds were furnished on credit by complainants and others, who in January or February, 1873, commenced suits by attachment for the recovery of their claims.

To secure an equal distribution of the assets of F. S. Chester among his creditors, Stillman, as he alleged, commenced proceedings in involuntary bankruptcy against him, and on March 19, 1873, he was adjudicated a bankrupt.

A few days before the last named date, F. S. Chester, who

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was indebted to Cone for rent of the mill site, and who claimed to be unable to pay the sum due, surrendered the lease to Cone, and thereupon Cone conveyed the mill site in fee simple to the wife of Stillman for the consideration of \$2,400 in money.

The bill in this case was filed by a large number of the creditors of the so-called firm of Chester & Co., who joined as complainants, against W. A. Sanborn, assignee of F. S. Chester, and against E. N. Chester, F. E. Town and Horace Stillman. The theory and averment of the bill was that F. S. Chester, E. N. Chester, F. E. Town and Horace Stillman were partners in the mill business under the name of Chester & Co.; that the mill and its appurtenances were the property of said firm and should be primarily applied to the payment of its debts, and that the proceedings of the assignee by which said property was seized as the individual property of F. S. Chester, and his purpose to apply it to the discharge of the individual debts of F. S. Chester, were in violation of the rights of the creditors of the firm.

The prayer of the bill was that the assets of the late firm of Chester & Co., which had been returned to the bankrupt court as assets of the bankrupt estate of F. S. Chester, and were in the possession of his assignee, might be adjudged primarily liable for the debts of Chester & Co., and that such order and decree might be made in the premises as would protect the rights of complainants as creditors of the firm of Chester & Co., and enable complainants to subject such assets to the payment of their claims. The district court made a decree substantially in accordance with the prayer of the bill, and the defendants appealed to the circuit court.

Messrs. L. I. Fleming, J. J. Daniel and F. P. Fleming, for complainants.

Messrs. C. P. Cooper and Robert M. Smith, for defendants.

WOODS, Circuit Judge. It is claimed by defendants that the case made by the bill does not fall within the equity jurisdiction of the courts of the United States. As the com-

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plainants are all citizens of Florida, and Sanborn, the assignee, who is one of the principal defendants, is also a citizen of Florida, the jurisdiction is not based upon the citizenship of the parties, but must be conferred, if at all, by the bankrupt act. The complainants rely on section 4970 of the Revised Statutes as their warrant for bringing the suit in the United States court. That section declares: "The several circuit courts shall have within each district concurrent jurisdiction with the district court . . . of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee."

Now it is perfectly clear that this is a suit in equity brought against the assignee by persons claiming an adverse interest touching property or rights of the bankrupt transferable to or vested in such assignee. The charge is that the assignee has possession of property, which he holds as the individual property of F. S. Chester, and which he is about to apply to the payment of the individual debts of F. S. Chester, which in fact belongs to the firm of Chester & Co., of which they are creditors, and which should be first applied to the payment of the debts of that firm. Clearly this is the very case provided for by the section first cited.

The case of *Stickney, Assignee, v. Witt*, 23 Wall., 150, sustains the jurisdiction in a similar case. The objection made by counsel for defense seems to be more to the decree of the district court than to the purview of the bill. The court may have exceeded its jurisdiction in the making of the decree. That, however, is not the question made. The real question is, has this court the jurisdiction to grant the relief or any of the relief prayed for? If it has, it must retain the bill for that purpose. It is conceded that the court has jurisdiction to decide in this case upon the claims of the complainants to have this property, as the property of Chester & Co., applied to the payment of their debts. It is there-

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fore the duty of the court to pass upon this question at least, and if the district court went further by its decree than was warranted by its jurisdiction, that fact does not change the duty of this court. The decree of the district court is vacated by the appeal. The case comes here for trial *de novo*, and the question is entirely open in this court what decree it shall make.

But this objection to the decree does not seem to me well founded. It was the duty of that court, sitting as a court of equity, having jurisdiction of the parties and subject matter, to do complete justice, and not, having decided that the complainants were entitled to have the property in controversy applied first to the payment of their debts, to turn them over to another forum to complete the relief to which they were entitled.

I am of opinion, therefore, that the objection made to the jurisdiction of this court is not well taken.

I proceed to consider other questions raised by the record.

The bill appears to be defective for want of a sufficient averment that the complainants have reduced their claims against the alleged firm of Chester & Co. to judgment. Without judgment the complainants have no right to insist on payment of their claims out of any specific property of their debtors. They have a right to be paid so much money by their debtors, but have no lien or claim upon any property of their debtors.

The bill does not allege the recovery of judgments by the complainants. It is true it refers to an exhibit which contains a list of the creditors of the alleged firm of Chester & Co., giving amounts, and opposite some of them is written the word "judgment" and a date. If this is intended as an averment that such claims have been reduced to judgment, it is a very ineffectual and insufficient way of making such an averment.

Passing over this defect in the bill, I proceed to a consideration of its merits.

The first claim I shall notice is that there was a partner-

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ship under the firm name of Chester & Co., of which Horace Stillman was a member. From this the inference is drawn that the firm could not be indebted to him, and he could not hold liens upon its property executed by another member of the firm in his own name.

Without deciding whether this conclusion follows from the premises, I am entirely satisfied that the proof fails to show that Stillman was a partner in the alleged firm.

There is no evidence to show that as between Stillman and the other alleged partners there was any partnership. The proof is clear and uncontradicted that he was not. But it is claimed by complainants that he was a partner as to strangers. He could only be made such by holding himself out as a partner, or allowing the other partners, with his knowledge, to hold him out as a partner. That he never held himself out as a partner is clear. The evidence is all on one side upon that issue. There is no evidence that he knew that the other so-called partners were holding him out as a partner, and no evidence that they did hold him out as such partner, with the exception of two instances. These are that Town took a bill of sale of the engine and mill in the name of F. S. Chester and Stillman, and the other that the lease by Cone for a mill site was made to F. S. Chester and Stillman as partners. As to the first, there is no evidence that it ever came to the knowledge of Stillman; and as to the second, it is in evidence that when Stillman discovered in February, 1872, the terms of the lease, he at once denounced it as implying a falsehood, and required the lease to be canceled and a new one executed in the name of F. S. Chester alone, and that he required the cancellation of the first lease, and that the new lease, and the cancellation of the old lease, should be put upon the public records of the county, and supposed it had been done. The bill avers, it is true, that with the business public in the vicinity of the mills and in Fernandina, the general impression was that Stillman was a partner in the firm of Chester & Co. Upon this averment the proof is

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conflicting. But it is not pretended, nor does the bill aver, that Stillman knew that any such idea existed. He did not represent himself to be a partner, nor did any of his alleged partners so represent him.

But it is claimed that the bond for \$6,000, given by F. S. Chester to Stillman, in which the former agreed in lieu of interest to pay Stillman a sum equal to the fourth part of the net profits of the saw mill and business, made Stillman a partner in the business.

Whether this made Stillman a partner it is unnecessary to decide. It could only make him a partner while this bond was in force, and only those persons who credited the firm while Stillman retained this bond could hold Stillman as a partner. There is no averment in the bill and no proof that any of the complainants became creditors of the firm while Stillman held the bond, or that they ever knew of the existence of the bond, and no proof in the record to sustain such an averment, if there were.

In short, the attempt to hold Stillman as a partner of the alleged firm of Chester & Co. has failed.

As to the claim made by the bill, that E. N. Chester and F. E. Town were partners in the firm of Chester & Co., the evidence shows conclusively that they were not in fact partners; but it shows that, with the knowledge of F. S. Chester, they held themselves out as such. The truth is, that there was in fact no such firm. The property all belonged to F. S. Chester; it was bought with his money and owned by him exclusively. Now, under this state of facts, which class of creditors is entitled to priority of payment out of this property—the creditors of F. S. Chester or the creditors of the supposed partnership? F. S. Chester never reported that E. N. Chester and Town were part owners of the mill and other property of Chester & Co. His exclusive title to this property could not be divested by any statements made in relation thereto by E. N. Chester and Town. If the firm of Chester & Co. existed as to strangers, it was a firm in which F. N. Chester owned all the property, and the other partners were interested

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only in the business, in its gains and profits. All the products of the business — all the lumber made, for instance — was liable for the partnership debts; but the individual property of one of the partners, even though used by the partnership to carry on its business, was liable in the first instance for the individual debts of the owner. *Murrill v. Neill*, 8 How., 414.

If I am right upon this proposition, the prayer of the bill, that this property may be first subjected to the payment of the partnership debts, cannot be sustained. It is individual and not partnership property, and must be first applied to the individual debts of the owner.

The fact is, that the complainants gave credit to the supposed firm of Chester & Co. without any inquiry as to the condition of the partnership or the title to the property with which the partnership business was carried on. Any inquiry addressed either to F. S. Chester or Stillman would no doubt have elicited the truth. No such inquiry was made. The rights of these men are not to be denied because the complainants have blindly bestowed credit on a supposed firm which had no means except what it might make in carrying on its business.

The conduct of F. S. Chester in allowing the lease of the mill site to become forfeited and the conveyance of the property to Mrs. Stillman, is a matter entirely immaterial to these complainants. The lease itself, burdened with a yearly rent reserved of \$100, was of little or no value; and even if its value had been considerable, it appears very clearly by the averments of the bill that the property of F. S. Chester, including the lease of the mill site, would be insufficient to pay the mortgages to Stillman. Without an averment that there would be a surplus after paying Stillman his claims, the disposition of the lease is a matter in which complainants have no concern.

The case is that Stillman loaned \$30,000 to F. S. Chester, to be used for the erection of his mill and the carrying on of the business. F. S. Chester was the only one of the three persons engaged in any way in the enterprise who had any

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money; the property used in the business was all his individual property, and did not belong to the firm; the property was bought with money furnished by Stillman, under an agreement that he should be secured by mortgages upon it. He has mortgages of record to the amount of \$23,000, which appears to be the full value of the property. The assignee of F. S. Chester is entitled to this property, for it is the individual property of F. S. Chester, and cannot be taken for his partnership debts until his individual debts are paid. The property will not pay these debts.

The complainants' partnership creditors have therefore no claim to this property, and their bill seeking to subject it to their debts must be dismissed at their costs.

Decree accordingly.

SOUTHERN DISTRICT OF FLORIDA.

MARCH TERM, 1880.

UNITED STATES v. NINETY DEMIJOHNS OF RUM.

1. The district court, upon an *ex parte* hearing, no claimant having appeared, dismissed a libel of information for the forfeiture of imported goods. *Held*, on appeal, that as the record did not set out the proofs upon which the court acted, no ground appeared for reversing its decree.
2. A libel of information filed for the forfeiture of goods, etc., for violation of the customs revenue laws, which does not aver an intent to defraud the United States, is bad.
3. A demijohn containing over four gallons is not a bottle, within the meaning of schedule D, section 2504, of the Revised Statutes, which requires that "wines, brandies, etc., imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package."

ADMIRALTY APPEAL.

The libel alleged that on the 26th day of March, 1879, F. N. Wicker, collector of customs at the port of Key West, seized and took into his custody, as forfeited to the United States, ninety demijohns, containing in all four hundred and five gallons of Spanish rum, the property of some person or persons to the United States and to the attorney of the United States unknown; that on the said 26th day of March, 1879, a Spanish schooner called the *Auftrite*, N. Nougueroles, master, brought to the port of Key West four hundred and five gallons of rum, otherwise called aquadiente, in ninety demijohns, and on the manifest of said schooner the said rum was consigned "to order;" that said rum was imported into the United States, to wit, the port of Key West, from Cardenas, Cuba, in large bottles, to wit, demijohns, and the same were not packed in packages containing

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not less than one dozen bottles in each package, as required by section 2504, schedule D, of the Revised Statutes of the United States, whereby and by force of the statute, said rum became forfeited to the United States.

It appeared from the record of the proceedings of the district court, that upon proclamation being ordered and made, no person appeared to claim any portion of the property seized. The court thereupon proceeded to hear the cause *ex parte* upon the allegations of the libel and proofs, and on such hearing dismissed the libel. Whereupon an appeal was taken in behalf of the United States to this court.

Mr. G. Bowne Patterson, United States Attorney, for the United States, who cited *Von Cotshausen v. Nazra*, 25 Int. Rev. Record, 342.

No counsel for appellee.

WOODS, Circuit Judge. The record does not contain the proofs. By the 29th admiralty rule prescribed by the supreme court of the United States, if the defendant "shall omit to make due answer to the libel on the return day of the process or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte* and adjudge thereon as to law and justice shall appertain." This was the course taken by the court in this case, and upon such hearing the libel was dismissed. Conceding that the averments of the libel make a case for a decree of forfeiture, the proofs may, for all that appears, have negatived those averments. If so, both law and justice would require that the libel be dismissed. All presumptions are in favor of the decree of the court. It is therefore impossible for this court to say that the district court erred, unless we have the evidence on which it based its decree. The record does not disclose that evidence.

But does the libel suggest such a case as would justify a

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forfeiture? By section 16 of the act approved June 22, 1874 (18 Stat., 189), it is provided that "in all actions, suits and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares or merchandise, . . . by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which suit, action or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court on the trial thereof to submit to the jury as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact, and in such cases, unless intent to defraud be so found, no fine, penalty or forfeiture shall be imposed."

I think it perfectly clear that this section makes intent to defraud the United States a necessary condition to the forfeiture of any goods, etc., for the violation of the customs revenue laws. A libel of information, therefore, which undertakes to state a case for the forfeiture of goods, should aver an intent to defraud the United States. Without such averment no case for forfeiture is made. The claimant might well decline to answer a libel in which such averment was wanting, trusting to the court to dismiss the libel for want of necessary averments, when it came to hear the case *ex parte*, and to adjudge thereon "as to law and justice should appertain."

The idea that a libel would be good when there was no default for want of an answer, which would be bad if an answer were filed and issue joined, is certainly untenable. The libel must set up all the facts necessary to a forfeiture. If it fails to do this, it is the duty of the court to dismiss it, whether issue is joined or not.

The libel in this case fails to aver an intent to defraud the

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United States. It was therefore fatally defective and could not support a decree of forfeiture. It was properly dismissed.

But, as I construe the statute on which the libel is based, no violation of the law whatever is charged. Section 2504, schedule D, of the Revised Statutes, on which the libel is founded, declares: "And wines, brandy and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle."

The only way in which this provision of the law can be made applicable to the facts charged in the libel, is by assuming that a demijohn, containing over four gallons, is a bottle within the meaning of the law.

That is not what is understood by a bottle in common parlance, nor in my judgment what the statute means by it. A demijohn is a glass vessel with a large body and small neck, inclosed in wicker-work. That the statute does not include four-gallon demijohns under the term bottles is clear; because if not impossible, it would be exceedingly inconvenient and cumbersome to pack not less than one dozen such demijohns in one package, as the statute requires to be done.

There is no provision of the statute forbidding the importation of liquor in demijohns. Having provided for the duty upon wines imported in casks and bottles, and on spirituous liquors imported in bottles, the statute imposes as a duty on "brandy and other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, \$2 per proof gallon." This would clearly include spirits imported in demijohns.

My conclusion is, therefore, that the importation of rum in four-gallon demijohns, and the failure of the importer to pack his four-gallon demijohns in packages not less than one dozen in each package, was not a violation of the provisions of schedule D, section 2504, of the Revised Statutes, and the libel does not set out any ground of forfeiture, and on

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that account was properly dismissed. If there had been a failure to observe the provisions of section 2504, I am of opinion that the goods imported would have been liable to forfeiture to the United States by virtue of section 3082 of the Revised Statutes, which declares that "if any person shall fraudulently or knowingly import . . . into the United States . . . any merchandise contrary to law, . . . such merchandise shall be forfeited," etc.

But even in that case it would be necessary to aver a guilty knowledge on the part of the importer, which in this case is not done.

The result of these views is that the libel must be dismissed, and it is so ordered.

 NOVEMBER TERM, 1882.

UNITED STATES V. STORES AND ANOTHER.

1. The word "timber" as used in section 2461, Rev. Stat., includes all such growing trees, without regard to their size, as might be or become of use in any kind of construction or manufacture.
2. The use to which a party has put the timber unlawfully cut by him upon the public lands does not relieve the act of unlawful cutting of its criminal character.
3. It is an offense under section 2461, Rev. Stat., for any third person to cut timber upon public lands entered for homestead.

Indictment under section 2461 of the Revised Statutes for cutting timber on the lands of the United States.

Mr. G. Bowne Patterson, United States attorney, for the United States.

Mr. J. B. Browne, for defendants.

LOCKE, District Judge (charging the jury). These parties have been indicted for cutting timber on lands of the United States contrary to the act of March 2, 1831, re-enacted in section 2461, Rev. Stat.; and there appear but two

questions which require for you any instructions from the court, namely, the meaning of the term "timber" as used in the statute; and the character of the land upon which such cutting, if any, was done, in respect to its title or ownership. The term "timber," as used in commerce, refers generally only to large sticks of wood, squared or capable of being squared for building houses or vessels; and certain trees only having been formerly used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as timber trees; but the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptance of terms in connection therewith, and we find that Webster defines "timber" to be "that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like." This would include all sorts of wood from which any useful articles may be made, or which may be used to advantage in any class of manufacture or construction.

With so many peculiar significations, the intended meaning of the word usually depends upon the connection in which it is used or the character of the party making use of it,—as, for instance, a ship-carpenter would understand something quite different when he made use of it from what a cabinet-maker, a last-maker or a carriage-builder would,—and the question is, therefore, not what is the popular meaning as understood by any one class, but its meaning as used in the statute, and how the legislators have employed it; and this must be its most general and least-restricted sense, including in such signification what each and all classes would under such circumstances understand "timber" to be.

The language of the section under which this indictment was found mentions particularly live-oak and red-cedar trees, and then speaks of other timber, showing conclusively that it was not the intention of congress to confine the protection intended to any particular class or kind of trees, but to apply it in its most general sense.

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To ascertain the meaning and intent of legislation, no more direct or satisfactory way can be suggested than by referring to the manner in which the same terms are used in other enactments.

This word has been frequently used by congress on different occasions and for different purposes. Section 2317 of the Revised Statutes, and the acts of 1874 and 1875, provide that persons planting and protecting timber on the public lands shall be entitled to patents therefor. Section 2464 provides for planting timber and keeping it in a growing condition. The same term is used also in sections 2465 and 2466, and in each of these places in a manner that precludes absolutely the idea that the term "timber" was intended to be confined to such trees or wood of such sizes as must be especially adapted to house or ship building. The term is here used for live, growing trees of a useful class, and cannot possibly be held to apply to those of a large size only.

The object of this prohibitory legislation is undoubtedly to prevent stripping the public lands of their growth of forests regardless of the present size and character of the individual trees, and the term used is intended to apply generally for that purpose, and if it is found that live trees of such a character or sort as might be of use or value in any kind of manufacture, or the construction of any useful articles, were cut, the charge in that respect, namely, the character of the timber, has been sufficiently proven. It matters not to what purposes the timber may have been applied after being cut, if converted to the use of the party accused. Selling it for fire-wood or burning it into charcoal would be no defense or excuse for cutting and removing; nor can it be evidence of the worthlessness of the timber cut sufficient to justify it. It must be found that the lands upon which the timber, if any, was cut were lands of the United States, sufficiently described and identified to satisfy you upon that point. It need not have been reserved or purchased for the sake of timber. A homestead entry, although it gives the party entering certain rights of occupation, does not so convey title

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or divest the United States of property in it as to change its character in this respect; and it is immaterial, therefore, whether the land had been entered for homestead by a third party or not. It is not claimed, nor does it appear, that the defendants herein had any interest, by homestead or otherwise.

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SOUTHERN DISTRICT OF MISSISSIPPI.

MAY TERM, 1877.

H. E. O'REILLY, ASSIGNEE, v. JOHN S. HOLT ET AL.

1. An act of the legislature of Mississippi, passed November 27, 1875, which levied a uniform tax of ten cents per acre per annum for levee purposes on all lands in certain counties in the state, and directed, without further notice to the owner, a sale on a specified day of all lands on which the tax had not been paid when due, is not in violation of section 13 of the bill of rights of the constitution of Mississippi, which prohibits the taking of private property for public use without just compensation; or of section 10, which declares that a citizen shall not be deprived of his life, liberty or property but by due process of law.
2. The fact that the purchaser at a tax sale was the deputy of the sheriff by whom the sale was made, does not render the sale *ipso facto* void, when it is not shown that the deputy had any part in making the sale, and there is no suggestion of any unfair practice or *mala fides* on his part in reference thereto.
3. The naked fact that the purchaser at a tax sale is clerk of the chancery court, in whose office the deed, to have effect, must be filed on the day of sale, does not render the sale absolutely void.
4. The owner of land sold for levee taxes under the act mentioned in the first head-note can redeem the same only upon the payment of the purchase money with all subsequent taxes due thereon, and fifty per cent. per annum interest on the whole amount.
5. An incumbrancer who holds a lien upon the undivided two-thirds of lands sold for levee taxes cannot redeem by the payment of two-thirds of the sum necessary to redeem the whole estate.
6. The purchaser of the land at a levee tax sale is entitled, on the redemption of the land by the owner, to all subsequent taxes paid by him, and fifty per cent. per annum interest thereon, although he has paid said taxes in scrip which he acquired at a discount.

IN EQUITY. Appeal from the district court.

The bill was filed by the complainant as assignee in bankruptcy of one Edington, to carry into effect certain decrees rendered by the chancery court of Adams county in favor of

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Edington for the enforcement of certain liens on lands situate in Issaquena county. Among others, C. S. Jeffards was made defendant, and it was alleged that he claimed to have some interest or lien upon the land against which the decrees of the state court were passed. Jeffards answered, setting up that he and one Sloan had, on April 14, 1873, purchased the lands at a sale made for taxes due to the levee board under the act of November 27, 1865; that afterwards Sloan had conveyed all his interest in said lands to him, the said Jeffards, and averring that he had since paid all taxes on said land, amounting to the sum of \$2,154.88, and claiming that he had a lien on the lands for the same, and was entitled to have the purchase money and all the taxes refunded, with legal damages and interest, and submitted himself to the protection of the court, and asked that his rights might be respected.

The property on which the decrees rested was sold, and the money brought into court, and the only controversy in the case was as to the amount which Jeffards was entitled to receive out of the proceeds of the sale by reason of the facts stated in his answer.

The act under which the lands in question were sold for taxes is the act approved November, 27, 1865, entitled "An act to incorporate the board of levee commissioners for Bolivar, Washington and Issaquena counties, and for other purposes."

The fourth section of the act declared that, for the purpose of building and repairing the levees in the counties mentioned in the title of the act, etc., there should be and was thereby levied a uniform tax of ten cents per annum on each and every acre of land in said counties, except lands held by the state in trust or otherwise, etc., and that the tax should be continued for twelve years, and should be payable annually on or before the 1st day of March in each and every year.

The fourteenth section of the act provided that said tax should be a lien until paid on the lands situate in said counties, and should the owner or other person interested in said lands fail to pay the tax at the time it fell due, it should be

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the duty of the sheriff of the county in which the lands were situate, without further notice, on the second Monday of April, to sell at the door of the court house the lands in default, or so much of them as might be necessary to pay the tax required; and when sold, to execute a deed therefor to the purchaser, which deed should vest in the purchaser a full and complete title in fee simple to the lands sold, and should be taken and received in any court of justice as vesting a perfect title in the purchaser, and should be evidence that the title of the owner as well as the claims of all persons interested therein were thenceforward vested in the purchaser, etc.

The fifteenth section of the act provided that lands sold by the sheriff as provided in section 14 might be redeemed at any time within two years after the day of sale by the owner, "upon the payment of the purchase money with all subsequent taxes due thereon, and fifty per cent. per annum interest upon the whole amount."

The defendant Jeffards claimed that he was entitled to his purchase money, and all subsequent taxes, whether state, county or levee taxes, and fifty per cent. on the whole amount. The complainant claimed that if Jeffards was entitled to any sum more than the actual taxes paid by him and ordinary interest, he was only entitled to fifty per cent. interest on the levee tax and not on other taxes.

The complainant moreover insisted that so much of the act of November 27, 1875, as directed the sale of lands for taxes without notice, was unconstitutional, and therefore that Jeffards derived no title by the tax sale, and was entitled to no penalty.

Mr. W. L. Nugent, for complainant.

Mr. E. Jeffards, for defendant.

WOODS, Circuit Judge. In support of the last proposition of complainant, we are referred to the case of *Griffin v. Mison*, 38 Miss., 424. The law which in that case was decided to be unconstitutional provided that lands should not be

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exposed to sale for taxes due thereon, but that the taxes should be collected by distress and sale of personal property, and that on the first Monday of April in every year the county tax collector should return to the county board of police a list of lands delinquent for non-payment of taxes; that the list should be examined by the board of police, and a certified copy should be posted on the door of the court house within ten days after such examination, and that said list, duly certified, should be filed and recorded in the auditor's office, and should vest a title to the lands therein returned in the state of Mississippi.

This act was declared by a divided court to be unconstitutional, on the ground that it was in violation of the thirteenth section of the bill of rights of the constitution of Mississippi, which prohibited the taking of private property for public use without just compensation being made therefor, and of the tenth section, which declared that a citizen should not be deprived of his life, liberty or property but by due course of law. Although this case has not been directly overruled, yet the present supreme court of this state, in the recent case of *Martin v. Dix*, not yet reported, have said that they think the views announced in the dissenting of Mr. Justice Handy better supported both upon reason and authority.

But the law under which Jeffards purchased differs materially from the act declared unconstitutional in the case of *Griffin v. Mixon*. By the former act an accurate and unchangeable assessment was made upon the lands subject to the tax by the legislature itself. The act gave notice to all of the time within which the tax must be paid, and it gave notice to all who failed to pay, that on a day named their lands would be put up for sale. There was no transfer of the title without a sale, of which public notice was given. The act is indeed summary, as all laws for the collection of taxes, to be effectual, must be. But it seems to me that the reasoning of Mr. Justice Handy in the case of *Griffin v. Mixon*, in support of a more summary law than the one in question, is unanswerable. As this law is not the same as

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that pronounced unconstitutional in that case by the majority of the court, and as there appears to be a change in the opinion of the supreme court of the state upon the question decided in that case, I feel at liberty to follow my own opinion, and to hold that the act of 1865 is not obnoxious to the constitution of the state.

But in the case of *Daily v. Swope*, 47 Miss., 367, the constitutionality of the levee law of 1871 was affirmed by the supreme court. In that case it was agreed between counsel, among other things, that any constitutional question arising upon said levee law, as to want of notice to taxpayers, and want of demand for the tax, and want of provision for adjudication of delinquency under the law, might be heard and determined by the court. The law, in its provisions for amount of tax, and sale, in case of delinquency, was identical with the law in question in this case. And it was objected to the law by Mr. Chalmers, of counsel for defendant in error, on the authority of *Griffin v. Mison*, that it was unconstitutional, because there were no steps prescribed, prior to sale, of notice, assessment, correction of assessment, etc.

But the court, in an elaborate opinion, held the law to be constitutional, and overruled all objections to it. This case is precisely in point, and as it is the latest adjudication of the highest court of the state upon the construction of the constitution of the state, and as it accords with my own views, I shall follow it and hold the act under which Jeffards purchased to be a valid and constitutional enactment.

It is next claimed that the title of Jeffards is void because Sloan, one of the purchasers at the tax sale, was deputy to the sheriff who made the sale, and Jeffards was clerk of the chancery court, with whom the tax deed, to have any effect, was required to be filed on the day of sale.

To support this objection to the sale we are referred to *Clute v. Barron*, 2 Mich., 192; *Morton v. Warring's Heirs*, 18 B. Monroe, 84, and *Everett v. Beebe*, 37 Iowa, 452. These cases do not sustain the proposition in support of which they

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are cited. They only declare that a public officer cannot buy at his own sale. In the case cited from B. Monroe it was held that a purchase made by the deputy register of the land office, of lands sold by his principal, was not absolutely void.

The objection to the capacity of Jeffards to buy does not seem to be any better founded. If it were held good, then no recorder of mortgages could ever be the mortgagee in a mortgage deed which was required to be recorded in his own office.

All that is required to make valid a sale to officers having such remote connection with the conduct of the sales as the deputy sheriff and clerk of the chancery court, is that their conduct in reference thereto should be fair and above suspicion. In this case there is not the slightest suggestion that the deputy sheriff had anything whatever to do in conducting the sale, or that his purchase was not a perfectly fair one; nor is there a hint that there was any improper or unfair conduct on the part of Jeffards in filing in his office the deed in question. We think that the claim that the purchase was absolutely void on account of the official *status* of the purchasers cannot be maintained.

I am of opinion, therefore, that the title of Jeffards under the tax sale was good, subject to the complainant's right of redemption.

As the bill in this case was filed within two years of the sale, the complainants are entitled to redeem on the terms prescribed by the law. The question is therefore presented, what must the complainants pay Jeffards to entitle them to redeem? The law appears to me to be explicit on this point. The owner shall be entitled to the redemption of said land at any time within two years after the day of sale upon the payment of the purchase money, with all subsequent taxes due thereon, and fifty per cent. per annum interest upon the whole amount. The contention of the complainant is that the fifty per cent. interest is only to be computed on subsequent levee taxes. But the law does not say so, and there

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does not appear to be any warrant for engrafting upon the language of the law the qualification insisted on. By the purchase at the tax sale the purchaser becomes the owner of the land and liable for the payment of all taxes assessed thereon. To enforce prompt payment of the levee taxes, the law says that the land *may* be redeemed on payment of *all* subsequent taxes and fifty per cent. interest thereon. This means all and not a part.

The complainant insists that as his lien covers only an undivided two-thirds of the land, he should only be compelled to pay two-thirds of the sum necessary to redeem. But the amount to be paid to redeem does not depend on the interest in the premises of the person proposing to redeem. He may be a mortgagee for an amount very much less than the value of the premises, yet he cannot claim, for that reason, that he should only pay a proportionate part of the redemption money. The purchaser stands on his title. He is not bound to yield it up unless his claim under the lien is satisfied. He has bought the whole estate in the land, and one tenant in common cannot insist that the estate shall be divided up and he allowed to redeem for his individual share.

I do not think any cross-bill is necessary to be filed by Jeffards. Having submitted to the redemption of the land, he is like any other incumbrancer. The court, on a bill to enforce complainant's lien, will direct the order in which the incumbrances shall be paid and ascertain their amount. Nor do I not think that the fact that Jeffards paid subsequent taxes in scrip which he purchased at a discount is any concern of the complainant. Jeffards had a right to make payment of the taxes in any lawful way. Redemption can be insisted on by the owner of the land on the payment of the subsequent taxes and fifty per cent. interest thereon, and not on the repayment of what it has cost the purchaser to pay the taxes.

The conclusion I have reached is that the defendant Jeffards is entitled to priority of payment out of the fund, the proceeds of the sale, for the amount of his purchase money

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and all subsequent taxes of all descriptions, with an annual interest thereon of fifty per cent., calculated up to the time of filing his answer, and six per cent. on that amount until the date of the final decree.

NOVEMBER TERM, 1881.

WOODSON C. TUCKER v. WM. BUTLER DUNCAN, RECEIVER.

1. A person receiving injuries by a collision with a train at a railroad crossing must show that the accident occurred without carelessness or default on his part, and that it was brought about by the negligence or misconduct of the servants of the railroad company.
2. Unless the injury is caused by the defendant's gross negligence or wilful act, the plaintiff cannot recover, if his own negligence directly or proximately contributed to produce the result.

This case was tried before the court without the intervention of a jury.

Messrs. Humphries & Sykes and W. P. & J. B. Harris,
for petitioner.

Messrs. P. Hamilton, E. L. Russell, L. Brame and J. M. Allen, for defendant.

HILL, District Judge. This is a complaint made by W. C. Tucker, in which he alleges that on October 11, 1880, he was with his wagon, drawn by one horse, crossing the Columbus branch of the Mobile & Ohio Railroad on St. Johns street, in the city of Columbus, Miss., when, without any carelessness or default on his part, by the careless and improper conduct alone of the employees operating the engine and train upon said railroad, his wagon was run against and thrown over, by means of which he was thrown from his wagon and received sundry severe wounds, endangering his life, very much disfiguring him, and causing him great bodily pain, for which he claims \$25,000 damages.

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To the complaint the defendant answers that the injuries complained of were caused by the careless and reckless conduct of the petitioner, and not by any negligence, misconduct or want of skill upon the part of his employees, as alleged.

Upon the issue thus made, a large volume of proof has been taken and submitted to the court, together with photographic views of the locality where the accident occurred, and upon which exhaustive comment has been made by the counsel, all of which I have carefully considered.

(The learned judge, having stated the facts, proceeded as follows:)

There is little difference of opinion as to the rules of law properly applicable to the facts as stated.

The supreme court of the state has decided that the statute requiring a sign-board, with the inscription, "Look out for the locomotive," to be put up at the crossing of the railroad over every highway, does not apply to streets in a city or town. "In the town the rate of speed is limited to six miles an hour, but the rate of speed in the country is unlimited, and hence the necessity of the greater precaution in the country at the railroad crossings of the public highways. . . . With ordinary prudence and care, there can be no danger to life from a locomotive and cars moving at a rate of only six miles an hour, especially if the bell be kept ringing or the whistle shall be kept blowing until the engine has stopped or passed through the town." *M. & O. Railroad Company v. The State*, 51 Miss., 137.

The petitioner, to entitle himself to compensation or redress, must show, first, that the collision occurred without any negligence, carelessness or wrongful act on his part; and secondly, that it was the result of carelessness, negligence or some wrongful conduct upon the part of the defendant or his employees. If it resulted from inevitable accident, brought about by the unmanageable conduct of the horse, or otherwise not attributable to the fault of the defendant or his employees, then no recovery can be had. These rules are so

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plain and well understood that reference to the authorities to sustain them is hardly necessary. When the crossing is dangerous, the duty is imposed both upon those engaged in conducting the engine and persons desiring to pass, to use every reasonable precaution to avoid a collision, and the necessity is increased in proportion to the danger. This duty is required equally of both parties. It is incumbent on those managing the train to give a signal by ringing the bell or sounding the whistle when approaching a crossing, to warn passers of the proximity of the engine or train, and to look and ascertain whether or not any one is about to cross the track, and, if so, to slacken speed, and, if need be, and it is possible, to stop, in order to avoid a collision. This is the duty on one side, and upon the other it is incumbent upon those desiring to make the crossing to use their powers of hearing and vision to ascertain whether or not there is likely to be a passing locomotive or train, and, if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, the passer is not required to stop, but he must use both of these faculties in every case. If there is such obstruction, then it is his duty to stop and both look and listen; if he neglect to use these precautions, and a collision results, then a recovery cannot be had, unless the injury was caused by gross negligence or wilful misconduct on the part of the employees conducting the operations of the railroad—the general rule being, that if the injured party contributes to bringing about the injury he cannot recover, although the employees may not be wholly blameless. *Railroad Co. v. Houston*, 95 U. S., 697; *Lake Shore, etc., Railroad Co. v. Miller*, 25 Mich., 274; *Telfer v. Railroad Co.*, 30 N. J. (Law), 188; *McGrath v. N. Y. Central, etc., Railroad Co.*, 59 N. Y., 468; *Allyn v. Boston & Albany Railroad Company*, 105 Mass., 77; *Penn. Railroad Company v. Beale*, 73 Pa. St., 504; *New Orleans, etc., Railroad Company v. Mitchell*, 52 Miss., 808; *Continental Improvement Co. v. Stead*, 95 U. S., 161.

The petitioner knew the dangerous condition of the cross-

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ing; that the warehouse formed an obstruction which in a degree prevented the seeing and hearing of a locomotive approaching from the east; and he also knew, or had reason to know, that it was the time for making up the train. It was therefore his duty, before attempting to cross the track, to both look and listen for the approach of the locomotive; and, if necessary, he should have stopped for that purpose. According to his own admission, this he neglected to do until his horse was frightened by the approach of the locomotive. Had the horse not become frightened, he was a sufficient distance from the engine to have stopped and waited for it to pass or get out of the way. Whether the fright of the petitioner prevented him from controlling the horse, or whether the horse could not be controlled, the fact is that it was not done, and petitioner urged him forward before the engine, with the hope of escape, and the collision ensued. This was certainly a very much to be regretted calamity to the petitioner and those dependent upon him, but one which it is difficult from the evidence to attribute to the fault of the defendant or his employees.

The proof is that the horse was usually gentle, and was accustomed to crossing at that point, yet from the testimony it is equally clear that on this occasion he became frightened without more than the usual cause; certainly this could not be anticipated by the engineer. He had a right to presume that petitioner would stop, and could not be expected to suppose that he would run the hazard of an attempt to cross in front of the engine. The testimony of the engineer, supported by the physical facts referred to, shows that the engine was nearly at a stand-still when the collision occurred. He could have done nothing more than he did to prevent the accident.

A careful consideration of the testimony satisfies me that the petitioner did not exercise the caution demanded of him, and that from this cause, and his own alarm and reckless attempt to pass in front of the engine, with the fright of the

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horse, the collision was brought about, without fault upon the part of the defendant or his employees; wherefore, under the rules stated, compensation must be refused.

Judgment for defendant.

JUNE TERM, 1881.

H. HENTZ & Co. v. W. A. JEWELL.

1. Promissory notes, the consideration of which is money advanced upon contracts made for the future delivery of cotton, and commissions for making such contracts, are valid and binding obligations.
2. To render a contract for the future delivery of cotton or other commodity void as a gaming contract, there must be an understanding between the parties that there is to be no delivery, but that the contract is to be satisfied by the payment of the difference between the contract price and the market price at the time fixed for the delivery.

ACTION AT LAW. Tried by the court without a jury.

Messrs. R. S. Buck and E. D. Clark, for plaintiffs.

Messrs. W. L. Nugent and T. A. McWillie, for defendant.

HILL, District Judge. The questions of fact as well as of law are by written stipulation submitted to the court upon the pleadings and evidence. The suit is brought to recover the amount due upon two promissory notes, one dated November 1, 1879, for the sum of \$4,727.27, payable ninety days after date, and the other dated November 15, 1879, for \$4,727.26, payable at ninety days, and both signed "J. D. Jewell & Bro." The declaration alleges that W. A. Jewell, the defendant, was a member of the firm of J. D. Jewell & Bro., and one of the makers of said notes.

One of the defenses set up against a recovery upon these notes, and the only one that demands special attention, is

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want of consideration, the averment of the plea being that the notes were given to the plaintiff for money advanced by them to pay losses sustained by Jewell & Bro. in dealing in what is known as "cotton futures," that is, contracts for the sale or purchase of cotton to be delivered at a future day, and that the contracts were gambling contracts.

The question raised by this defense is one of no little interest, as these cotton contracts are becoming so numerous and of such immense proportions; still, as I understand the rules by which they are to be governed, they are simple and not difficult of application.

First, a contract for the sale of cotton, grain or other commodity at a given price, to be delivered at a future time, is valid and binding, and each party is entitled to enforce the contract against the other, and in case of failure to recover damages for non-performance. When it is a purchase for resale, or the article can be immediately supplied by purchase in the market, then the damages consist in the difference between the sum contracted for and the market price of the commodity at the time for delivery. But if it is an article which the purchaser specially needs, and cannot supply without delay and additional expense, then such an amount as will "make him whole" is the measure of damages. If, according to the contract between the parties when made, either may demand a strict compliance when the time for performance arrives, then the contract is valid, even though one of the parties may secretly intend at the time not to comply, if such non-performance is not agreed to by the other contracting party at the time of the contract.

In other words, to render the contract invalid, there must at the time of its creation be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid.

Respectable authorities hold that when the contract is in writing and such understanding is not expressed, that parol testimony is inadmissible to establish it. Such are the contracts proven in this case; that is, there was no agreement

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for non-delivery, and if this rule is applied it will cut off this defense.

There is, however, no sufficient proof in this case, written or verbal, to show that no delivery was to be made, but only differences paid. To sustain the positions above stated, reference is made to *Lehman Bros. v. Strassburger*, 2 Woods, 554; *Clark v. Foss*, 7 Bissell, 540; *Porter v. Viets*, 1 Bissell, 177; *Kingsbury v. Kirwan*, 77 N. Y., 612.

The notes were not given in payment for balances upon these cotton contracts, but for money advanced by plaintiffs to pay the differences on contracts made by them upon the orders of J. D. Jewell & Bro., and for commissions as brokers in making said contracts; consequently the same rules do not apply as those between the contracting parties — the plaintiffs being only agents and brokers advancing the money, and having no interest in the contracts themselves. The notes were given after the money was paid and the services performed; consequently there is no public policy to be subserved by denying the plaintiffs the money they have advanced and compensation for the services performed. This position is sustained by the case of *Lehman Bros. v. Strassburger*, which is similar in its facts to the present case. I am satisfied that plaintiffs are entitled to judgment against defendant for the amount of the notes sued upon and interest. Judgment accordingly.

NORTHERN DISTRICT OF MISSISSIPPI.

DECEMBER TERM, 1881.

SEALE, ASSIGNEE, v. VAIDEN, HAWKINS & ROBERTS AND
OTHERS.

An assignment was made by failing debtors, which provided for the payment of a certain per centum of the debts due those creditors who had assented to the assignment, and had agreed to discharge the debtors from the residue of their claims, and for the payment of all other creditors in full out of any surplus that might remain, and it was clear upon the face of the assignment, and the schedule annexed thereto, that there would be no surplus. *Held*, that the assignment was fraudulent and void as against non-assenting creditors.

IN EQUITY. Heard upon motion to dissolve injunction.

Messrs. Wm. Houston and J. W. Buchanan, for complainant.

Mr. J. K. McIntosh, for defendant.

HILL, District Judge. This bill was filed by complainant against defendants and others, creditors of Abernathy & McCarley, in the chancery court of Chickasaw county, for the purpose of enjoining the defendants, as creditors, from proceeding by attachment to recover their debts out of the property conveyed by said creditors to complainant by trust deed exhibited with the bill. An injunction as prayed for was granted by the circuit judge of said district. The cause is removed to this court under the act of congress of March 3, 1875. The defendants Vaiden, Hawkins & Roberts sued out an attachment against said Abernathy & McCarley in the circuit court of Chickasaw county, which had also been removed to this court, and is now pending. Said Vaiden, Hawkins & Roberts move in this court to dissolve said injunction, so far as it relates to those attachment suits against

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said Abernathy & McCarley, upon the ground, as alleged, that, as to them, the assignment under which complainant holds is fraudulent and void. And this is the only question now presented for decision.

The provisions of the trust deed, which it is alleged renders it fraudulent and void, are those relating to the order of distribution of the assets of said assigned property, and the conditions annexed to its reception by creditors. The trustee is directed, first, to pay all the costs and expenses of executing the trust; secondly, a note executed by the grantors to their attorneys for \$500; thirdly, to pay to all the creditors who might apply within thirty days thirty-three and one-third per cent. on their debts, provided they would release the balance of their demands; fourthly, to pay all other creditors who should apply within sixty days after said assignment was made the amount due them in full, if there should be money sufficient for that purpose, and if not, then a *pro rata* share to each, provided they should release the remainder of their debts, if any; fifthly, to all other creditors the amount due them, and of any surplus which might remain after the before-mentioned payments.

The schedule annexed to the trust deed, and which, for the consideration of the question now for decision, may be regarded as part of the conveyance, states the liabilities at \$13,566.40, and the assets at \$9,552.90; but in these estimates are embraced cotton in the hands of Vaiden, Hawkins & Roberts, estimated at \$480, and in the hands of Gardner, Gates & Co., valued at \$1,680, and that the indebtedness to said Gardner, Gates & Co. is \$3,177.86, and that to Vaiden, Hawkins & Co., \$1,889.12. It is clear that these creditors had a lien upon the cotton in their hands, and a right to apply the proceeds to the payment of their accounts, which, when done, would reduce the amount of assets to \$7,392.90, and would reduce the liabilities to \$11,456.40. Experience has shown, until it is almost a matter of judicial knowledge, that a remnant of a stock of goods and of debts can rarely, if ever, be made to realize more than half their nominal

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value. The trust deed provides that the sum of \$500 should be paid in full to the attorneys of the grantors; also the expenses of executing the trust, including \$50 per month to the assignee. These expenses, at the least, will amount to \$500, making, in all, at least \$1,000 to be paid before any other creditors. The value of the assets, if placed at fifty cents on the dollar, would amount to \$3,696.45; but, according to the proof of the assignee, they realized about \$4,000, which shows better success than usual.

Deduct from this sum \$1,000, would leave \$3,000 for creditors. The proof is that five-sixths of the creditors in amount were present, and agreed to the assignment and to the reception of thirty-three and one-third per cent. of the amount due them. This was done before the assignment was made. Thirty-three and one-third per cent. on the amount due these creditors, as shown by the schedules, amounts to the sum of \$3,182.15, which would absorb all the remaining assets and leave nothing. So far as it relates to these accepting creditors, there can be no doubt that the assignment is valid and binding, especially as they agreed to it before it was made, and before the grantor had parted with the assets and property conveyed.

The question is as to whether or not it is valid as to the non-assenting creditors, of whom Vaiden, Hawkins & Roberts compose a part. It is considered that when an assignment of this character is made, in which a participation in the assets is dependent upon entering a release of the remainder of the debt due, and there is no provision made for a distribution of the surplus among the non-assenting creditors, that such conveyance would *per se* be held fraudulent and void; but it is contended that the provision made for the third class of creditors avoids this result. Complainant's counsel, to sustain this position, rely upon the case of *Spaulding v. Strang*, 37 N. Y., 135, and *S. C.*, 38 N. Y., 10.

I am of opinion that the rule laid down in those cases goes to the verge in upholding these assignments; but in these cases the assignment is held valid because of the con-

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tract between the parties, and as a mode of preference by classes. I doubt that the court in these cases would have held the assignment valid, had it been shown upon the face of the assignment and schedule annexed to it, to a moral certainty, as in this case, that nothing would be left to the non-assenting creditors. The vice of the release demanded cannot be cured by a contingency which, it is apparent from the face of the conveyance, schedule and proof, can never take place.

Vaiden, Hawkins & Roberts were not present when the assignment was agreed to by the assenting creditors, and are in no way bound by what they did, when we consider the creditors who, in amount, agreed to the assignment, and consequently to its terms, and the largest sum which the assets could reasonably be expected to produce. It was in effect saying, upon the part of the grantors, to their non-assenting creditors: Your participation in the property and assets conveyed depends upon your releasing to us two-thirds or the remainder of your just demand against us. This is a demand not sustained by law, and which renders this conveyance fraudulent and void as against Vaiden, Hawkins & Roberts, the defendants who move to dissolve the injunction.

There has been produced no ruling by the supreme court of the United States upholding such an assignment as the one under consideration. The rulings upon assignments containing provisions for a release of the residue of the creditor's debt, so far as they have come before the supreme court of this state, have been adverse to the validity of such assignments, so that this court is left free to pass upon the question presented upon its intrinsic merits. A careful consideration of the arguments and authorities cited by the learned counsel who have argued this case has led me to the conclusion above stated, and that is that, from the face of the conveyance, schedules, and the proof read in evidence by the complainant, the trust deed must be held fraudulent and void, and as conveying no title as against Vaiden, Hawkins & Roberts, and that as to them the injunction granted

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by the circuit judge should be dissolved, and they permitted to proceed with their attachment suit as though said conveyance had never been made. And it is so ordered, but only as to these parties; as to all others, the cause will remain as though this order had not been made.

DECEMBER TERM, 1882.

GOODBAR AND OTHERS V. CARY AND OTHERS.

A conveyance of its property by an insolvent firm to pay the individual debts of its partners, contracted for money borrowed to be used, and in fact used, in the business of the firm, is a fraud on the creditors of the firm, and at their instance will be deemed void.

One Cary and R. P. Richardson were partners doing business under the firm name of Cary & Richardson. In 1874, said partnership then existing, one E. Richardson, who was then a partner in another firm under the name of Richardson & May, loaned said Cary \$2,000, and took his two notes therefor, payable in one and two years. On February 7, 1875, the same E. Richardson loaned to R. P. Richardson, the other member of the firm of Cary & Richardson, the sum of \$4,771, and took his note therefor due one day after date. On January 7, 1881, all the notes above mentioned were due and unpaid, and the firm of Cary & Richardson was insolvent and embarrassed, and was indebted to the said firm of Richardson & May, of which said R. P. Richardson continued to be a partner, in the sum of \$14,239, and to other creditors in the sum of \$13,884.

On the day last mentioned Cary & Richardson conveyed by deed to E. Richardson certain real estate, estimated to be worth \$2,500, in part payment of the said notes held by him against Cary and R. P. Richardson, respectively, and on the same day, but afterwards, they executed a deed in which

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they stated their inability to pay all their debts in full, conveying all their remaining property, consisting of goods and choses in action, to a trustee in trust, to be applied first to the payment in full of the debt due from the firm of Cary & Richardson to the firm of Richardson & May, and the residue, if any, to the payment *pro rata* of the debts due to other creditors of the firm of Cary & Richardson. E. Richardson, at the time of the execution of said deed to him, knew of the insolvency of the firm of Cary & Richardson and of their purpose to execute said trust deed, and of the provisions it was to contain.

The money loaned by E. Richardson to Cary and to R. P. Richardson, respectively, was borrowed by them for the purpose of being used, and was used, in their firm business. E. Richardson knew that Cary and R. P. Richardson had no means except what they employed in their firm business, and he relied on the firm property and assets for the payment of the money loaned by him to its individual members.

The complainants, creditors of the firm of Cary & Richardson, having reduced their debt to judgment, and the execution issued thereon having been returned unsatisfied, filed their bill to set aside the said deed from Cary & Richardson to E. Richardson. The bill set forth the facts above stated, and alleged that by reason thereof said deed was fraudulent and void as against complainants.

Messrs. R. H. Taylor and H. A. Barr, for complainants.

Messrs. Edward Mayes and J. G. Hall, for defendants.

HULL, District Judge. Among other allegations of fraud, and that now relied upon, is that the debts due E. Richardson, the grantee, were individual obligations, and that due to complainants is a debt due by the firm, and that the lands conveyed belonged to the firm and are primarily liable for the firm's debts. That the real estate was firm property before this conveyance is admitted. The question is, was the conveyance of the land described in the bill, under the circumstances, a fraud upon the rights of complainants and

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the other creditors holding firm debts against Cary & Richardson? It is insisted for defendants that the money loaned to each of the members of the firm was understood at the time as intended to become a part of the capital of the firm, and that the loan of part to one and part to the other was to enable them to equalize their capital stock, and that, as they had no individual property, E. Richardson looked to the property and business of the firm for payment, and that he has an equitable claim on the firm and its assets, and that the payment to him by the conveyance of the land was in good faith and free from fraud, and vested in the grantee a valid title.

If it were true that the money had been loaned to the firm, and that the individual notes of the members of the firm, each for a portion, as a security for the payment of the firm liability, then it would have remained a firm liability, and this conveyance, being free from fraud, would have conveyed a good title. The fact that it was understood between the parties that the money after the loan was made was to be used in the firm business, could not of itself, according to the weight of authority, at least, create a liability upon the firm, nor could the fact that E. Richardson knew that the partnership had no individual means, and that if repayment was made it would be out of the interest which the makers of the respective notes had in the business and property of the firm, have the effect to bind the firm; and this is all that appears from the answers of the defendant, relied upon to create any equity in favor of E. Richardson upon the firm property and assets. He had the right to obtain judgment against the maker of the note, his individual debtor, and have his execution levied upon the interest of the defendants in the execution in the property and assets of the firm. That interest was the share to which the defendant might be entitled after the payment of the firm debts and the amount due his copartner. This is elementary law, and sustained by the adjudications. Without considering this question further, I am satisfied that these

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notes are individual obligations, and have no other claim or equity to the firm property and assets than that of any other individual creditor.

It is a well settled rule of law in this state, that, so long as a firm is solvent, all its members assenting, the individual debts of the parties may be paid out of the firm assets, as no one would be injured thereby. It is also settled by the supreme court of the United States, on general principles, in the case of *Case v. Beuregard*, 99 U. S., 119, that simple contract creditors have no lien upon the joint assets of a firm until the property has passed *in custodia legis*, and that if, before the interposition of the court is asked, the property has passed into the hands of a *bona fide* purchaser, or by a *bona fide* transfer has ceased to be the property of the firm, it cannot be held liable to the firm creditors' demands, and that the equities of the firm creditors to satisfaction out of the firm assets are derived through the equity which each partner has upon the firm assets to have the same applied to the payment of the firm liabilities, and then for the payment of whatever may be due the partners upon a settlement of the affairs of the partnership. In this case the bill was not filed so as to bring the lands within the jurisdiction of this court until after the conveyance to Richardson, and if that transfer, under the circumstances, was free from fraud in law or fact, there remained no such equity in complainants as to entitle them to the relief prayed for, which leaves the question as to whether or not the conveyance, under the circumstances, was fraudulent. If fraudulent, it being in payment of antecedent debts, it would be void as against existing creditors of the firm, whether the grantee knew it was fraudulent or not. This rule is sustained by a current of unbroken decisions by the supreme court of this state, and recognized and adopted by the supreme court of the United States as a general rule in the case above referred to; so that if this bill is maintainable, it cannot be upon the idea that complainants had any lien upon the firm property, and the lands in question in particu-

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lar, which this court can as a court of equity enforce, if there was no fraud in fact or in law in the transfer. If, however, there was such fraud in law or in fact as against complainants, who were at the time of the transfer existing creditors of the firm, then the conveyance was void as to them, and they are entitled to the relief prayed for in the bill.

It is apparent, from what is stated in the pleadings and in the agreement, that Richardson, the grantee, knew at the time the deed was executed that Cary & Richardson, the grantors, were insolvent, both as a firm and individually, and that, as part of their transaction then to be made, they would divest themselves of all their property and assets, and would have nothing left with which they could make voluntary payments, or upon which their firm creditors could obtain satisfaction of that which was due them, provided the assignment to their trustee was valid. And further, the conveyance acknowledged their insolvency upon its face. This conveyance placed Cary and Richardson in the same condition they would have been under an adjudication of bankruptcy or insolvency under judicial proceedings.

It is held by the supreme court of the United States in the case of *Shanks v. Klein*, 104 U. S., 18, that in case of the death of one of the partners the real estate held by them as firm property will be treated as personal assets and applied to the payment of the debts of the firm; and Justice Miller, delivering the opinion of the court, quotes approvingly from Story's Equity, in which it is held that the creditors have an interest indirectly in the appropriation of such property; not that they have a lien, legal or equitable, upon the property itself, but upon the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be *legally* or *honestly* diverted to the private use of the parties.

It is held by the court of appeals of New York, in the case of *Wilson v. Robertson*, 21 N. Y., 587, that the appropriation by an insolvent firm of partnership property to the payment

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of the individual debts of one partner, is not simply void, but is fraudulent, and avoids the deed of assignment. The same court, in the case of *Menagh v. Whitwell*, 52 N. Y., 146, holds that a "transfer by one of the partners or a lien given by him upon the *corpus* of the partnership property to pay an individual debt, although made with the consent of the other partners, is fraudulent and void as to the creditors of the firm, unless the firm was at the time solvent, and sufficient property remained to pay the partnership debts;" that is, if the firm is insolvent at the time of the transfer, it is fraudulent and void. The same doctrine is held by the supreme court of Illinois in *Keith v. Fink*, 47 Ill., 272, referring approvingly to the case of *Wilson v. Robertson* in 21 N. Y., above referred to, in which it is held that to pay the individual debt of one of the partners is in effect a gift from the firm to one of the partners — a reservation for the benefit of such partner or his creditors to the direct injury of the firm creditors.

The fact that the partners joined in a conveyance of the firm assets to pay the individual debts of each, though to the same creditor, would, under the above rule, be but a gift by each to the other, or his individual creditor; and the cases of *Schmidlap v. Currie*, 55 Miss., 597; *Roach v. Brannon*, 57 Miss., 490, and other cases referred to and relied upon as maintaining the opposite rule, when examined, do not apply to a case in which the parties are bankrupt or insolvent, so declared by their deed of assignment, in which they divest themselves of all their property and rights in action, as in this case.

After a careful examination of the question, and the authorities relied upon on both sides, I am unable to come to any other conclusion than that this conveyance, under the circumstances, was a fraud in law upon the rights of complainants and the other firm creditors, who were such at the time of the execution of the deed, and that complainants, having obtained a judgment, with a return of *nulla bona*, have the right by their bill to have a decreesetting aside the

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conveyance as to their claim, and to the payment of their judgment out of the proceeds of the sale of the land, unless the same shall be paid within a reasonable time. The sale being valid as between the parties, Richardson, the grantee in the deed, has a right to discharge the complainants' judgment and costs and retain the land.

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ABATEMENT.

See STATUTES CONSTRUED, 16.

ACCOUNT.

See EQUITY, 10.

ACTION AT LAW.

See TRESPASS TO TRY TITLE. PLEAS IN BAR. RAILROADS, 1, 2.

1. The right of action to recover damages for trespass to real estate does not, either at common law or by the statutes of Texas, pass to the devisee of the land. *Withers v. Burkett*, 335
2. A patentee whose letters patent had more than sixteen years to run, sold the exclusive right to J. S. to use, and license others to use, for the period of five years, the invention described in the patent. *Held*, that the patentee could, during said period of five years, maintain an action against an infringer. *Still v. Reading*, 345
3. In such an action the petition should allege that the defendant had no authority from J. S. to use the invention. *Ib.*

ADMIRALTY.

See STATUTES CONSTRUED, 7. PRACTICE IN ADMIRALTY.

1. On a clear moonlight night, a steamer and sailing vessel, running in opposite directions on a river between half a mile and a mile wide, collided with each other; the two boats having been in plain sight of each other immediately before the collision, while running a distance of about four miles. *Held*, that these facts put the burden of proof on the steamer to show that she was not in fault. *The Prince Edward*, 17
2. It is no defense to a libel brought against the vessel in fault to recover damages caused by a collision, that the owners of the injured vessel have been satisfied by the insurers for the damages sustained by her. *The Yeager*, 18
3. The services of boats equipped with steam pumps and other apparatus for the extinguishment of fires upon vessels, in putting out a fire upon a ship moored at the levee in New Orleans, are salvage services. *The Suliote*, 19
4. The amount of salvage to be allowed depends on the extent and danger of the salvage service, the risk to which the vessels and other property employed in the service are exposed, the value of the property saved, and the imminence of the peril by which it is threatened. *Ib.*

5. Salvage should be regarded in the light of compensation and reward and not of prize, and should not exceed what is necessary to insure the most prompt, energetic and daring effort at rescue. *Ib.*
6. A fire upon a vessel loaded with cotton and moored at a wharf, the vessel, cargo, etc., being valued at \$250,000, having been extinguished with little exertion and little risk to the salvors and their craft, eight per cent. on the value of the vessel, cargo, etc., was allowed as salvage. *Ib.*
7. In the distribution of salvage earned by steam vessels equipped for the extinguishment of fires, and their officers and crew, the men were allowed a certain number of months' wages, graduated in some degree by the services rendered by the vessels respectively. *Ib.*
8. The amount paid for procuring, compressing and loading a cargo of cotton should contribute to the salvage earned in extinguishing a fire upon a vessel before her voyage had actually commenced. *Ib.*
9. In the distribution of salvage in this case, regard was had to the fact that the value of the aid rendered by one of the salvor's vessels was enhanced by the fact that she was specially designed and equipped for the extinguishment of fires, and was always ready and powerfully efficient for that purpose. *Ib.*
10. A contract by a vessel engaged in making regular trips between two ports, for the employment of a purser for a year, gives the party employed a lien for his wages for the entire year, and if discharged without cause before the end of his term of service, he may enforce his lien against the vessel. *The Wanderer*, 25
11. The owner of a steamboat who has chartered her to another is a "third person" within the meaning of art. 3274 of the civil code of Louisiana; and one who furnishes supplies to the boat in her home port, during the life of the charter-party, cannot assert a lien against her after she has been returned to her owner, unless he has recorded his lien according to law. *The Cara*, 28
12. There can be no maritime lien on a vessel founded on an unexecuted contract to furnish towage. *The Prince Leopold*, 48
13. A sailing vessel which kept her course, but whose red and green lights were not screened, and which set no torch light at her bow, was sighted two miles distant by a steamship. The boats collided with each other. *Held*, that both were in fault, and that the damages should be divided. *The Alabama*, 48
14. In case of injury to a seaman by the fault or neglect of the officers of the boat, he is entitled to full wages and to keep and medical attendance until restored, and to passage home. *The Centennial*, 50
15. If the injured seaman is kept and cured at a hospital without expense to himself, no allowance should be made him for his subsistence or medical attendance. *Ib.*
16. Where an appeal from the district to the circuit court is taken for delay merely in a suit brought by a seaman to recover wages, etc., while disabled by the fault of the officers of the boat, interest will be allowed. *Ib.*
17. Sureties upon a bond given for an appeal in admiralty from the district to the circuit court compromised the decrees rendered against them in the latter court. The principal on the bond appealed to the supreme court, by which the decrees were in all respects affirmed. *Held*, that execution issued against the sureties upon

- the return of the mandate of the supreme court should be quashed.
The Sabine, 83
18. If a contract is maritime in its nature and effect, it will be enforced by the admiralty courts of the United States, though it may not be considered a maritime contract in the courts of the country where it is made. *Maury v. Culliford*, 118
 19. A maritime lien is not essential to give jurisdiction to courts of admiralty. *Ib.*
 20. Neither a notice to a party to a maritime contract that he would be held in damages for its non-performance, nor a refusal to give orders for the lading of a ship after the time fixed by the contract for accepting her had passed, cancels the contract. *Ib.*
 21. Where a steamboat worth about \$35,000 or \$40,000 moored to the wharf in the port of New Orleans, and with only a watchman on board, on a dark night and in a gale of wind broke from her moorings, and, being without steam or other propelling power, drifted down the river to the peril of herself and other shipping, and the watchman on board rang his bell for assistance, which was rendered by two tugs, and the steamboat was towed by them with much trouble, and some risk to themselves and crews, to a place of safety: *Held*, that the service was a salvage service, and that \$300 was a reasonable allowance therefor. *The Henry Frank*, 127
 22. The statute of Louisiana, which, in case of wrongfully caused death, continues to the next of kin the right of action for the damages inflicted on the deceased person, was intended to establish a rule of survivorship for the government of the community who constitute the state of Louisiana, and could not include a cause which does not concern its inhabitants, or did not originate within its territory; and it could not, in such latter case, give a lien or authorize an action against a vessel. *The E. B. Ward, Jr.*, 145
 23. No action can be maintained in the admiralty courts of the United States, by the widow or next of kin, to recover damages sustained by them on account of the death, tortiously caused, of the husband or other kinsman upon the high seas. *Ib.*
 24. A bill of lading for a lot of pig iron contained the stipulations that the vessel was "bound to deliver the same weight of iron, provided it be weighed along-side at discharging, . . . the pig iron to be taken from along-side and discharged at the rate of two hundred and fifty tons per running day," etc. *Held*, that a delivery upon the wooden wharf in the port of New Orleans was a compliance with the stipulations of the bill of lading, and the vessel was not bound to carry the iron across the wharf to the land, notwithstanding the fact that the wharf regulations prohibited the piling of iron upon the wharf, and the iron was not allowed to be weighed along-side the ship, but only upon the land. *Turnbull v. Citizens' Bank*, 192
 25. A raft of timber afloat and in peril upon a public navigable water may be libeled in a court of admiralty for salvage services. *A Raft of Timber*, 197
 26. When the services of salvors conduce to the saving of the property imperiled, but would have been unavailing without other aid, and the salvage service is completed by other salvors, *held*, that the first set of salvors is entitled to compensation. *Ib.*
 27. When loss or damage to goods intrusted to a common carrier is shown, the presumption of law is that it was occasioned by his

- fault, and the burden is on him to prove that it was occasioned by a cause for which he is not responsible. *The Excellent*, 246
28. A watch dog, part of the cargo of a ship, and known to the master to be likely to bite strangers, was, with the consent of the master and owners of the ship, chained under a table in the cabin. *Held*, that the master and owners were guilty of negligence in placing the dog there, and that the ship was liable *in rem* to a person who, being lawfully in the cabin, was bitten by the dog. *The Lord Derby*, 247
29. Damages allowed by the district court will not be increased or diminished by the circuit court where no additional testimony has been taken, unless the injustice of the allowance is manifest. *Ib.*
30. A vessel is seaworthy when her hull, tackle, apparel and furniture are in such condition of strength and soundness as to resist the ordinary action of the sea, wind and waves during the contemplated voyage. *The Orient*, 255
31. When a vessel was shown to have been seaworthy for the two years next preceding the voyage on which she was wrecked, and she was wrecked in a cyclone of great violence, *held*, that the burden was cast on the insurers to prove her unseaworthy. *Ib.*
32. A policy of insurance upon a vessel bound to New Orleans, which was her home port, contained these clauses, the first written, and the second printed:
 "To navigate the Atlantic ocean, between Europe and America, to be covered in port and at sea."
 "Warranted by the assured not to use port or ports in eastern Mexico, Texas nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports of the West India islands between July 15th and October 15th."
Held, that the policy covered the loss of the vessel in the Gulf of Mexico, the conduct of the insurers showing such to be their construction of the policy. *Ib.*
33. A floating dry dock, which was a wooden box which had been securely and permanently fastened for fourteen years to the bank of a navigable stream, which was used solely for the purpose of docking vessels for inspection and repair, which had no means of self-propulsion, and was practically incapable of being navigated, could not be the subject of salvage services, and a libel therefor against the owner would not lie in the admiralty. *Cope v. Vallette Dry Dock Co.*, 265
34. Where the owners of several steamboats are not in fact partners, and neither own nor use them in common, and there is no community of profits, but they allow their boats to be advertised as forming a line under a common name, and employ a common agent, who solicits custom and transacts business for all the boats, *held*, that no one of the boats or its owner is liable for the contracts or torts of the others. *Citizens' Ins. Co. v. The Kountz Line*, 268
35. The bill of lading issued to a shipper by one of the boats composing such line, made out in her own name, is notice, and amounts to a contract that the boat by which it was issued should be alone bound. *Ib.*
36. The lien for salvage and for damage to goods is inferior to the lien of seamen for wages earned on a voyage subsequent to that on which the claims for salvage and damage arose. *The Lillie Laurie*, 312
37. Claims, which are liens by the general maritime law, are entitled to priority of payment over claims of mortgagees, whether their mort-

- gages were registered before or after the origin of the maritime liens. *Ib.*
38. Liens for salvage and for damages, upon a contract of affreightment, are entitled to priority of payment over debts subsequently contracted for supplies furnished in the home port, and which are a lien upon the vessel by virtue of state law only. *Ib.*
39. The district court dismissed the libel of a salvor for salvage, and rendered decrees in favor of the furnishers of supplies in the home port, each of the decrees being for a less sum than \$50, and therefore not subject to appeal. The proceeds of the vessel were insufficient to pay the claim for salvage and the decrees for supplies. The salvor appealed to the circuit court, and pending his appeal the decrees rendered by the district court for supplies were paid in full out of the proceeds of the vessel. *Held*, that the decrees were improvidently paid, and that the question, which was entitled to priority of payment, the salvor or the furnishers of supplies, was carried up by the appeal of the former. *Ib.*
40. A charter-party provided as follows: The cargo (iron rails) "is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, and being so loaded, she shall proceed to Galveston Bay, or so near thereto as she may safely get." Lighterage was notoriously necessary at the port of Galveston. *Held*, that the ship was not bound to pay lighterage for discharging the cargo. *Carr v. Austin & Northwestern R. R. Co.*, 337
41. Where a charter-party which constituted the contract between the parties made no provision for the payment of primage, none was allowed, although it was stipulated for in the bill of lading. *Ib.*
42. Where the amount of the decree of the district court was reduced by the circuit court on appeal by claimants, it was ordered that the costs of the district court be paid by appellant, and of the circuit court by appellee. *Ib.*
43. The explosion of the boilers of a steamboat while in charge of her officers and crew makes a *prima facie* case of negligence, which, unless rebutted, entitles a passenger injured by the explosion, who is shown to have exercised reasonable care, to recover the damages sustained by him. *The Reliance*, 430

AFFIDAVIT.

See REMOVAL OF CAUSES, 1.

AGENCY.

See MALICIOUS PROSECUTION.

ALABAMA.

See STATUTES CONSTRUED, 7.

AMENDMENT.

An amendment to the bill by which complainants for the first time sought to charge the defendant as trustee made a new case, in which the defendant was not properly before the court, and the amendment should be stricken from the files. *Oglesby v. Attrill*, 114

APPEAL.

See ADMIRALTY, 16, 39, 41.

APPEARANCE.

- A defendant to a suit in a state court who moves to quash the service of process upon him, and petitions for the removal of the cause to a court of the United States, and upon such removal renews his motion to quash, does not thereby enter an appearance by which the service of process is made unnecessary. *Parrott v. Alabama Life Ins. Co.*, 853

APPROPRIATION OF PRIVATE PROPERTY.

1. According to the principles of general jurisprudence, private property cannot be taken or damaged for public use without compensation, either by authority of the police powers of the state, or under the right of eminent domain. *Hollingsworth v. Parish of Tensas*, 280
2. When land has been appropriated to the public use, so that physically, and in law, the owner is excluded from its dominion or beneficial uses, it is "taken or damaged," within the meaning of the rule above stated. *Ib.*

ARBITRATION.

Parties may legally, by their own agreement, refer the amount of damage under their contract to arbitrators, and by a proper covenant withdraw that question from the courts. *Gauche v. London & Lancashire Ins. Co.*, 102

ASSIGNEE IN BANKRUPTCY.

See PARTIES.

ASSIGNMENT.

1. A deed of assignment by which all the property of the assignee, not subject to forced sale, is conveyed to a trustee in trust to pay the proceeds thereof *pro rata* among such creditors of the assignor as should receive the sums so paid in satisfaction of their claims, and the residue, if any, to the assignor, is fraudulent and void under the laws of Texas. *Lawrence v. Norton*, 406
2. An assignment was made by failing debtors, which provided for the payment of a certain per centum of the debts due those creditors who had assented to the assignment, and had agreed to discharge the debtors from the residue of their claims, and for the payment of all other creditors in full out of any surplus that might remain, and it was clear upon the face of the assignment, and the schedule annexed thereto, that there would be no surplus. *Held*, that the assignment was fraudulent and void as against non-assenting creditors. *Seale v. Vaiden*, 659

ATTORNEY.

See REMOVAL OF CAUSES, 1. VACANCY IN OFFICE, 1, 2.

BANKRUPTCY.

See EQUITY, 33. JURISDICTION, 18. PARTNERSHIP, 5.

1. The bankrupt act of 1867 does not authorize the institution of proceedings against the individual estate of a deceased person.
Adams v. Terrell, 337
2. The bankruptcy court acquires no jurisdiction over the individual estate of a deceased partner by a proceeding against the late firm of which he was a member. *Ib.*
3. Where the adjudication in bankruptcy is void, parties who bought property at the bankruptcy sale cannot protect their title by the two years' limitation prescribed by the second section of the bankrupt act. *Ib.*
4. A suit in equity, brought against a bankrupt and his assignee in bankruptcy, to foreclose a mortgage executed by the bankrupt, is not barred by the limitation prescribed by section 5057 of the Revised Statutes. *Gildersleeve v. Gaynor*, 541

BILLS OF EXCHANGE.

See NOTES AND BILLS.

BILL OF LADING.

See ADMIRALTY, 34, 35.

1. A bill of lading for a lot of pig iron contained the stipulations that the vessel was "bound to deliver the same weight of iron, provided it to be weighed along-side at discharging, . . . the pig iron to be taken from along-side and discharged at the rate of two hundred and fifty tons per running day," etc. *Held*, that a delivery upon the wooden wharf in the port of New Orleans was a compliance with the stipulations of the bill of lading, and the vessel was not bound to carry the iron across the wharf to the land, notwithstanding the fact that the wharf regulations prohibited the piling of iron upon the wharf, and the iron was not allowed to be weighed along-side the ship, but only upon the land. *Turnbull v. Citizens' Bank*, 192
2. The fact that a shipper of cotton was allowed by a common carrier to fill up a bill of lading in his own handwriting, and leave a space which afforded opportunity for fraudulently increasing the statement of the number of bales shipped, does not make the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading. *Lehman, Dun & Co. v. Central, etc., R. Co.*, 560

BILL OF REVIEW.

1. Upon a bill of review the court will not consider errors of fact.
Brown v. White, 614
2. A decree will not be reversed upon bill of review for errors by which the complainant in review was not damaged. *Ib.*

BOND.

See PLEA IN BAR, 4.

BURDEN OF PROOF.

See COMMON CARRIERS, 4. EVIDENCE, 3.

On a clear moonlight night, a steamer and sailing vessel, running in opposite directions on a river between half a mile and a mile wide, collided with each other; the two boats having been in plain sight of each other immediately before the collision, while running a distance of about four miles. *Held*, that these facts put the burden of proof on the steamer to show that she was not in fault. *The Prince Edward*, 17

CASE DISTINGUISHED.

The case of *Broderick's Will*, 21 Wall., 503, followed, and the case of *Gaines v. Fuentes*, 92 U. S., 10, distinguished. *Ellis v. Davis*, 6

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CHARGE TO JURY.

A charge not applicable to any evidence in the case is properly refused. *Einstein v. Gourdin*, 415

CHARTER CONSTRUED.

See STATUTES CONSTRUED, 17.

CHARTER-PARTY.

See LIGHTERAGE. PRIMAGE.

CIVIL RIGHTS.

Congress had no constitutional power to pass the act of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights" (Sup. to Rev. Stat., vol. 1, p. 148). Said act is therefore null and void. *United States v. Washington*, 849

CODE OF LOUISIANA.

See STATUTES CONSTRUED, 2.

COLLISION.

See ADMIRALTY, 1, 2, 13.

COMMENCEMENT OF SUIT.

When a contract provides that suit shall not be brought on it till the expiration of a specified time, the issue of the writ is the commencement of the suit. *Gauche v. London & Lancashire Ins. Co.*, 102

COMMON CARRIERS.

See EVIDENCE, 3.

1. When loss or damage to goods intrusted to a common carrier is shown, the presumption of law is that it was occasioned by his fault, and the burden is on him to prove that it was occasioned by a cause for which he is not responsible. *The Excellent*, 246
2. A contract by which a railroad company agrees to furnish an express company daily, for transportation of express matter, so large a space upon its cars as to disable the railroad company from serving other express companies equally entitled to be served, is illegal and void. *Texas Express Co. v. Texas & Pacific R'y Co.*, 370
3. The contracts between railroad and express companies must be so framed as to graduate the compensation to be paid the former, by the number of persons, and quantity and, perhaps, quality of matter, transported, and so as not to discriminate between different express companies in the rates of fare and freight charged. *Ib.*
4. The explosion of the boilers of a steamboat while in charge of her officers and crew makes a *prima facie* case of negligence, which, unless rebutted, entitles a passenger injured by the explosion, who is shown to have exercised reasonable care, to recover the damages sustained by him. *The Reliance*, 420
5. The fact that a shipper of cotton was allowed by a common carrier to fill up a bill of lading in his own handwriting, and leave a space which afforded opportunity for fraudulently increasing the statement of the number of bales shipped, does not make the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading. *Lehman, Dun & Co. v. Central, etc., R. R. Co.*, 560
6. The case against the liability of the carrier is strengthened by the fact that the shipper was the customer of the parties who sustained the loss, and though not their agent, was engaged in a business in which the latter were interested and was trusted by them to send forward true bills of lading. *Ib.*

COMPTROLLER OF THE CURRENCY.

See NATIONAL BANKS.

CONDITION PRECEDENT.

See INSURANCE, 1.

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- A contract made since the late civil war for the sale and delivery of coupon bonds, issued by the Confederate States of America, is based on an illegal consideration, and is therefore void. *Branch v. Haas*, 587

CONFISCATION.

- A seizure, confiscation and condemnation of real estate, under the act of August 6, 1861, entitled "An act to confiscate the property used for insurrectionary purposes" (12 Stat., 319; Rev. Stat., sec. 5308), divested the title of the owner to the fee simple. *Kirk v. Lewis*, 100

CONSIDERATION.

See CONTRACTS, 9, 10.

1. M., who was insolvent, conveyed to L., the mother of his wife, substantially all his property which was subject to execution, the alleged consideration being the payment of an account due from M. to L. Within two days thereafter, L., in consideration of natural love and affection, conveyed the same property to her daughter, the wife of M. *Held*, that these circumstances were indications of bad faith, and the deed executed by M. to L. could be sustained only on the ground that it was made for a valuable consideration and to pay an honest debt. *Clay v. McCally*, 605
2. The consideration for the conveyance made by M. to L., above mentioned, was an account said to be due from M. to L. for more than \$42,000. The account had been running for twenty-three years; no demand for the payment of it or any part of it had ever been made; some of the items were such as showed conclusively that their amount had been guessed at; others were for rent of land which L. did not own, but had previously conveyed to the wife of M., and for all it was evident that L. had not considered M. her debtor; no part of the account had ever been reduced to writing, and it was stated for the first time on the day the conveyance was made. *Held*, that the account was trumped up and fraudulent, and would not sustain the conveyance. *Ib.*
3. A gratuity cannot subsequently be converted into a debt so as to become the consideration of a conveyance made by the grantor to the injury of his creditors. *Ib.*

CONSOLIDATION OF CORPORATIONS.

See CORPORATIONS, 4.

CONSTITUTIONAL LAW.

1. Under art. 123 of the constitution of Louisiana of 1868, a privilege on stock was required to be recorded in the registers of mortgages, liens and privileges to have any effect against third persons. *New Orleans Banking Association v. Wiltz*, 43
2. Where a corporate body had conferred upon it by its charter the exclusive right to carry on within certain territorial limits the business of slaughtering animals for food, and its business was conducted without offense to the public interests, health, manners or morals, there was no constitutional power in either the legislature or the authorities of any municipal corporation to take away its exclusive privileges. *Crescent City, etc., Co. v. Butchers' Union, etc., Co.*, 96
3. A charter granting the exclusive right to a water-works company to supply a city with water is a contract with the state, which is protected from impairment by the constitution of the United States. *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 134
4. Private property cannot be taken or vested rights impaired by the legislature without compensation, upon the claim that the acts are done in the exercise of the police power of the state. *Ib.*

5. Congress has constitutional power to prohibit and punish the doing by officers of an election for representative in congress, of any act unauthorized by law, with intent to affect the election or its result. *United States v. Bader*, 189
6. Unless otherwise provided by law prior to their issue, municipal bonds have their *situs* where their owner resides, and when owned by non-residents of the state cannot be constitutionally subjected to taxation either by the state or the municipality which issued them. *De Vignier v. New Orleans*, 206
7. The exaction of unreasonable and exorbitant wharfage is not the laying of a duty of tonnage. *Ouachita Packet Co. v. Aiken*, 208
8. An ordinance and contract by which a city farmed out its wharves to private individuals, and prescribed the rates of wharfage which they might exact, are not a regulation of commerce with foreign nations and among the several states in derogation of the exclusive power of congress over that subject. *Ib.*
9. As long as congress has passed no law regulating wharfage, the courts of the United States have no jurisdiction to abrogate state laws on the subject, on the ground that the rates of wharfage allowed are unreasonable and exorbitant. *Ib.*
10. The courts of the United States have jurisdiction of a suit between citizens of the same state without regard to the defenses set up, or to be set up, in the answer, which, upon the face of the petition, is one arising under the constitution or laws of the United States. *Sawyer v. Parish of Concordia*, 273
11. When the plaintiff in a court of the United States insists in his petition that an act of the state legislature impairs the obligation of the contract in which his suit is brought, and is therefore void, the fact that the state supreme court has held the act to be unconstitutional and void does not oust the jurisdiction of the United States courts. *Ib.*
12. Congress had no constitutional power to pass the act of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights" (Sup. to Rev. Stat., vol. 1, p. 143). Said act is therefore null and void. *United States v. Washington*, 349
13. A state law which authorizes a personal judgment against a non-resident defendant upon the service of process on him outside the limits of the state, is beyond the legislative power, and is null and void. *Parrott v. Alabama Life Ins. Co.*, 358
14. Under the present constitution of Texas, an elector otherwise qualified who has resided in the state one year, and in the district in which he offers to vote six months next preceding the election, is entitled to vote for all state and district officers. *United States v. Slater*, 356
15. That part of section 1, article X, of the constitution of Texas which declares: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-executing, but requires appropriate legislation to regulate the exercise of the right thereby conferred; and the exercise of such right may be restrained until, by negotiation or legal proceedings, it is established with proper limitations and conditions. *Missouri, etc., R'y Co. v. Texas & St. Louis R'y Co.*, 360
16. The act of the legislature of Georgia entitled "An act to provide for the regulation of freight and passenger tariffs in this state,"

- etc., passed October 14, 1879, does not revoke any of the privileges or immunities of said railway company in such manner as to work injustice to its corporators or creditors, and is therefore not in violation of paragraph 3, section 3, article 1 of the constitution of the state. *Tilley v. The Railroad Commissioners*, 427
17. The power to regulate railroad freights and passenger tariffs being conferred by the constitution of Georgia upon the legislature, the question, what are just and reasonable rates, is a legislative and not a judicial one. *Ib.*
 18. The legislature does not lose its right to modify or repeal the charter of a railroad company because the company had issued its bonds and secured them by a mortgage upon its property at a time when the state was a stockholder, and because the stock of the state had been voted in favor of the execution of the bonds and mortgage. *Ib.*
 19. The delegation to railroad commissioners of the duty of making a schedule of reasonable and just rates of freight and passenger tariffs, by which the railroad companies were to be governed, is not in violation of paragraph 1, section 2, article 4 of the constitution of Georgia. *Ib.*
 20. An act of the legislature of Georgia provided for the appointment of railroad commissioners, and required them to make schedules of reasonable and just rates of freight and passenger tariffs for the several railroad companies of the state respectively, and forbid the railroad companies under heavy penalties to exceed the rates so prescribed, and declared that the schedule established by the commissioners should be sufficient evidence that the rates therein fixed were just and reasonable. *Held*, that the act, even though the rates fixed by the commissioners were unjust and unreasonable, does not violate that provision of the constitution of Georgia which declares that "private property shall not be taken or damaged for public use without just and adequate compensation being first paid," nor of that provision which declares that "protection to persons and property is the paramount duty of the government, and shall be impartial and complete," nor of that provision which declares that "no person shall be deprived of life, liberty or property, except by due process of law," nor of that provision which declares that "laws of a general nature shall have a uniform operation throughout the state," nor of that provision which declares that "the right of trial by jury shall be inviolate." *Ib.*
 21. The constitution of Georgia provides: "the court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation." *Held*, that in a suit on a promissory note, a plea denying the title of the plaintiff to the note is such issuable defense, although, if true, it may also show that the court is without jurisdiction. *Lanning v. Lockett*, 455
 22. In the courts of the United States, such issuable plea must be tried by a jury. *Ib.*
 23. Section 2 of article II of the constitution of the United States, which declares that "the president shall have power to fill up all vacancies which may happen during the recess of the senate," authorizes the president to fill a vacancy which happened during the session of the senate and continued to exist after the senate had adjourned. *In re Farrow and Bigby*, 491
 24. Legislation which abrogates or limits the power of taxation granted to a municipal corporation, upon the faith of which contracts were

made by it, and without which they cannot be enforced, is invalid and void. *United States ex rel. v. Port of Mobile*, 536

25. An act of the legislature of Mississippi, passed November 27, 1875, which levied a uniform tax of ten cents per acre per annum for levee purposes on all lands in certain counties in the state, and directed, without further notice to the owner, a sale on a specified day of all lands on which the tax had not been paid when due, is not in violation of section 13 of the bill of rights of the constitution of Mississippi, which prohibits the taking of private property for public use without just compensation; or of section 10, which declares that a citizen shall not be deprived of his life, liberty or property but by due process of law. *O'Reilly v. Holt*, 645

CONTRACTS.

See ADMIRALTY, 10. ARBITRATION. COMMENCEMENT OF SUIT. GIVING IN PAYMENT, 1, 2. JURISDICTION, 4. PARTNERSHIP, 1, 2.

1. Neither a notice to a party to a maritime contract that he would be held in damages for its non-performance, nor a refusal to give orders for the lading of a ship after the time fixed by the contract for accepting her had passed, cancels the contract. *Maury v. Culford*, 118
2. A charter granting the exclusive right to a water-works company to supply a city with water is a contract with the state, which is protected from impairment by the constitution of the United States. *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 134
3. On February 28, 1874, the complainant company entered into a contract with defendant company, which was to continue in force for two years, by which it agreed to furnish sleeping cars to be used by the defendant, sufficient to supply the demands of travel on its line of road, for which the defendant agreed to pay a specified rate. The contract further provided as follows: The car company shall have "the option, if exercised within two years from the date" of the contract, "to determine whether it will make with" the railroad company "a contract of the form and kind hereto attached, marked H, and that if" the car company "shall within two years determine to make such contract," the railroad company "shall enter into such contract" with the car company. The form of contract marked H provided, in substantially the same terms as the original contract, for the furnishing of cars by the complainant to the defendant, and also provided as follows: The car company "is to have the exclusive right for fifteen years to furnish such drawing-room, parlor, sleeping and reclining chair cars on all passenger trains of the railway company on its entire lines, present, prospective, now controlled or hereafter to be controlled by ownership, lease or otherwise, and also on all passenger trains on which it may by virtue of contracts with other roads have the right to run such cars; and the railway company is to agree that it will not contract with any other parties to run said class of cars over said lines of road for fifteen years." The complainant within the two years gave notice to the defendant that it elected to enter into said contract H, and executed the same on its part, and sent it to defendant to be executed by it. But the defendant company had made a contract with another car company for the use of its cars, and refused to execute said contract H, and gave notice to the complainant that it would not use complainant's cars. Upon bill filed by the car company alleging the above facts, and praying for an injunction to restrain defendant from discontinuing the use

- of complainant's cars and from refusing to perform the other stipulations of said contract H, and from permitting any other company to furnish cars for the use of its said lines of road: *Held*, (1) That the exercise of the option by the complainant, provided for in the first contract, made the second contract (H) of binding obligation, without further execution. (2) Such second contract was not affected by the statute of frauds of Texas, nor was it forbidden by the laws of Texas or the charter of the defendant company. (3) The injunction prayed for should not be granted. *Pullman Car Co. v. Texas & Pacific R'y Co.*, 817
4. A contract by which a railroad company agrees to furnish an express company daily, for transportation of express matter, so large a space upon its cars as to disable the railroad company from serving other express companies equally entitled to be served, is illegal and void. *Texas Express Co. v. Texas & Pacific R'y Co.*, 870
 5. The contracts between railroad and express companies must be so framed as to graduate the compensation to be paid the former, by the number of persons, and quantity and, perhaps, quality of matter transported, and so as not to discriminate between different express companies in the rates of fare and freight charged. *Ib.*
 6. A promissory note in the usual form, but containing this further stipulation, "in case of legal proceedings on this note we agree to pay ten per cent. of the amount for attorney's fees," is a negotiable instrument under the law merchant, and the *bona fide* indorsee can enforce the stipulation against the makers. *Adams v. Addington*, 889
 7. A contract between two corporations not authorized but not forbidden by their charters will not, if executed, be overturned, but will be allowed to stand as the basis of the rights of the parties acquired thereunder. *Taylor v. South & North Alabama R. R. Co.*, 575
 8. An executed contract constructively fraudulent, for the issue of preferred stock, made by a corporation in excess of its corporate powers, but not forbidden by law or against public policy, will not, after an acquiescence of ten years by the stockholders, be disturbed at their suit on the ground that it was *ultra vires*. *Ib.*
 9. A contract made since the late civil war for the sale and delivery of coupon bonds, issued by the Confederate States of America, is based on an illegal consideration, and is therefore void. *Branch v. Haas*, 587
 10. Promissory notes, the consideration of which is money advanced upon contracts made for the future delivery of cotton, and commissions for making such contracts, are valid and binding obligations. *Hentz v. Jewell*, 656
 11. To render a contract for the future delivery of cotton or other commodity void as a gaming contract, there must be an understanding between the parties that there is to be no delivery, but that the contract is to be satisfied by the payment of the difference between the contract price and the market price at the time fixed for the delivery. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1, 2.

CORPORATIONS.

See CONSTITUTIONAL LAW, 2. EQUITY, 25, 26, 27, 28. MALICIOUS PROSECUTION. SALE, 1. STOCKHOLDER, 1, 2.

1. A Louisiana corporation organized under a general law of the state cannot, by its private charter and by-laws adopted for its own government, create a privilege on property actually and necessarily within commerce. *New Orleans Banking Association v. Wiltz*, 43
2. When a plaintiff, alleging itself to be a private corporation, brings a suit based on rights depending on its corporate capacity, the defendant may set up as matter of defense that such corporation has no existence in law. *New Orleans Gas Light Company v. Louisiana Light, etc., Co.*, 90
3. Under the act of the legislature of Louisiana, entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," approved December 12, 1874, the Crescent City Gas Light Company, incorporated in 1870, with the exclusive franchise of making and vending gas in New Orleans for fifty years, beginning April 2, 1875, could not be consolidated with the New Orleans Gas Light Company, incorporated in 1835, with the exclusive franchise of making and vending gas in New Orleans until April 1, 1875, when its charter expired. *Id.*
4. Where one incorporated company is consolidated with another under the name of the latter and transfers to it all its assets, the new company is liable for the debts of the old to the extent of the assets transferred. *Brum v. Merchants' Mutual Ins. Co.*, 156
5. An act of the legislature of Texas which recognizes the existence of a corporation organized under the laws of Kansas, and confers upon it within the state of Texas the same rights and powers as were granted it by the state of Kansas, within its territory, but does not purport to create a new corporate body, is merely an enabling act, and does not make such corporation a corporate body or citizen of the state of Texas. *Missouri, etc., R'y Co. v. Texas & St. Louis R'y Co.*, 360
6. An act of the legislature of Georgia which provided that a certain railroad company of that state should have power to sell its road within the state of Georgia to any railroad company of another state which might, by the laws thereof, be authorized to purchase the same, and that such company so buying should have all the rights and privileges of the said company so selling, does not, on the purchase of said railroad by such railroad company of another state, make the latter a corporation of the state of Georgia. *Morgan v. East Tennessee & Virginia R. R. Co.*, 523

COSTS.

Where the amount of the decree of the district court was reduced by the circuit court on appeal by claimants, it was ordered that the costs of the district court be paid by appellant, and of the circuit court by appellee. *Carr v. Austin & Northwestern R. R. Co.*, 327

COUNSEL FEES.

A complainant who in a proper case files a bill of interpleader against two defendants both claiming a fund in the complainant's custody, on which a decree is made by the court by which the rights of the defendants are settled, is entitled to be paid out of the fund reasonable counsel fees for bringing the bill. *Louisiana Lottery Co. v. Clark*, 169

COURT.

See STATUTES CONSTRUED, 25.

COURTS OF THE UNITED STATES.

See CONSTITUTIONAL LAW, 19, 20.

The courts of the United States are bound to follow the decisions of the state courts only when they are based on the laws of the state which "fix rights to things intraterritorial in their nature, or which fix rules of property." *Hollingsworth v. Parish of Tensas*, 280

CRIMES AND OFFENSES.

See STATUTES CONSTRUED, 11. INDICTMENT.

1. The fraudulent addition by the officers of an election for representative in congress, to an incomplete list of the voters required by law to be kept by them of the names of persons not voting, with intent to affect said election, is an offense against section 5515 of the Revised Statutes. *United States v. Bader*, 189
2. No penalty is prescribed by section 5467 of the Revised Statutes, for the offense of embezzling a letter with valuable contents, by a person in the postal service of the United States. *United States v. Long*, 454
3. The word "timber" as used in section 2461, Rev. Stat., includes all such growing trees, without regard to their size, as might be or become of use in any kind of construction or manufacture. *United States v. Stores*, 641
4. The use to which a party has put the timber unlawfully cut by him upon the public lands does not relieve the act of unlawful cutting of its criminal character. *Ib.*
5. It is an offense under section 2461, Rev. Stat., for any third person to cut timber upon public lands entered for homestead. *Ib.*

CUSTOMS.

A custom to be binding must be reasonable, and proof of a custom can in no way be used to vary the terms of an unambiguous contract. *Turnbull v. Citizens' Bank*, 193

DAMAGES.

See ACTION AT LAW, 1. ADMIRALTY, 13, 14, 15, 16, 28, 29. POSSESSOR IN BAD FAITH, 2, 3, 4, 5.

DATION EN PAIEMENT.

See GIVING IN PAYMENT.

DEATH TORTIOUSLY CAUSED ON THE HIGH SEAS.

No action can be maintained in the admiralty courts of the United States, by the widow or next of kin, to recover damages sustained by them on account of the death, tortiously caused, of the husband or other kinsman upon the high seas. *The E. B. Ward, Jr.*, 145

DECISIONS OF STATE COURTS.

The courts of the United States are bound to follow the decisions of the state courts only when they are based on the laws of the state which "fix rights to things intraterritorial in their nature, or which fix rules of property." *Hollingsworth v. Parish of Tensas*. 280

DECREE.

1. If the decree of a court is free from ambiguity it speaks for itself, and cannot be qualified by the opinion of the court by which it was preceded. *New Orleans, etc., Railroad Co. v. New Orleans*, 1
2. The fact that in a suit against a large number of persons the subpoenas for some of the defendants against whom decrees *pro confesso* had been taken were not found in the record, does not render the decree on the merits against such defendants irregular and fraudulent. *Gaines v. New Orleans*, 218
3. When there is a decree for complainant, all the issues raised by the pleadings, although not noticed in the decree, will be considered as decided in favor of complainant. *Brown v. White*, 614

DECREEES PRO CONFESSO.

See DECREE, 2.

DEDIMUS POTESTATEM.

See EVIDENCE, 6.

DEED.

See DEED OF TRUST. FRAUDULENT CONVEYANCES.

DEED OF TRUST.

1. A deed for land in Georgia, made by a husband to a trustee in trust for the use and benefit of his wife, provided that the land conveyed should be free from the debts, contracts and liabilities of her husband, except such incumbrances and liens as by the written direction of the grantor and his wife might be placed thereon. *Held*, (1) That the power to incumber contained in said deed was not contrary to the code or policy of the state of Georgia. (2) That a mortgage upon the land, executed by the written direction of the grantor and his wife, was a valid incumbrance thereon. *Aetna Ins. Co. v. Brodinax*, 477
2. The provision for incumbrances in such deed is not inconsistent with the grant and does not render the deed void. *Ib.*
3. Under such a deed a valid mortgage could be made to secure a debt of the husband past due. *Ib.*

DELIVERY.

See ADMIRALTY, 24. EVIDENCE, 3.

DEMIJOHN.

See STATUTES CONSTRUED, 80.

DEPUTY MARSHAL

See INDICTMENT, 3, 4.

DESTRUCTION OF PROPERTY UNDER SEIZURE BY JUDICIAL PROCESS.

Where property is seized by a judicial process which carries with it a *jus in re*, as between creditor and debtor, the destruction of the property, without fault of the debtor, works a payment of the debt to the extent of its value. *Gill v. Packard*, 270

DEVISEE.

The right of action to recover damages for trespass to real estate does not, either at common law or by the statutes of Texas, pass to the devisee of the land. *Withers v. Burkett*, 335

DISCLAIMER.

See PLEA IN BAR, 1, 2.

DISCOVERY.

See EQUITY, 10.

DISTRICT COURT OF THE UNITED STATES.

See STATUTES CONSTRUED, 23.

DRY DOCK.

See SALVAGE, 11.

ELECTIONS.

See CONSTITUTIONAL LAW, 5, 12. CRIMES AND OFFENSES, 1.

ELECTORS.

Under the present constitution of Texas, an elector otherwise qualified who has resided in the state one year, and in the district in which he offers to vote six months next preceding the election, is entitled to vote for all state and district officers. *United States v. Slater*, 356

EMBEZZLEMENT OF LETTER.

See CRIMES AND OFFENSES, 2.

EMINENT DOMAIN.

See POLICE POWER, 2.

EQUITY.

See ASSIGNMENT. CONTRACTS, 3. INJUNCTION, 2, 4. PARTIES. PRACTICE IN EQUITY. RES JUDICATA, 2. TRESPASS TO TRY TITLE, 1, 2.

1. Although courts of equity are not strictly bound by the local laws of prescription, yet they generally follow the analogy of those laws and refuse to enforce claims that have become stale by the lapse of the prescribed period. *Chapman v. Wilson*, 80
2. But in cases of peculiarly equitable cognizance regard is always paid to the force of special circumstances. *Ib.*
3. By the local law of Louisiana actions for nullity or rescission of contracts are prescribed by the lapse of five years. *Held*, that a bill in equity to set aside a settlement on the ground of fraudulent concealment, which was not filed until twelve years after the settlement, and nine years after the discovery of the alleged fraud, should, under the circumstances of this case, be dismissed on account of unreasonable laches and the staleness of the claim. *Ib.*
4. Where it appeared from the bill, which was sworn to, that the court had jurisdiction of the case, and a sworn plea was filed which admitted the material averments of the bill, but stated facts on which the jurisdiction was denied, but to sustain which no competent proof was offered, and there was no other defense, *held*, that there should be such decree for complainant as was warranted by the averments of the bill. *Likienthal v. Washburn*, 65
5. Where there is not an adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the state in the state courts. *National Bank of New Orleans v. Bohné*, 74
6. A motion for injunction *pendente lite*, to restrain the infringement of a patent, was heard upon the bill, affidavits and other proofs, before answer. *Held*, that upon the showing that the validity of the patent had been sustained by a decree of a court of the United States, and that the defendant had infringed, the injunction should issue. *Excavating Company v. Lauman*, 129
7. The pendency of a suit in a state court for the foreclosure of a mortgage is not a bar to a suit in the circuit court of the United States between the same parties for the foreclosure of the same mortgage. *Weaver v. Field*, 152
8. The *flat* of a judge or court, directing executory process to issue on a mortgage given to secure the payment of money, cannot be pleaded as *res judicata* in bar of a suit brought to foreclose the mortgage. *Ib.*
9. A complainant who in a proper case files a bill of interpleader against two defendants both claiming a fund in the complainant's custody, and a decree is made by the court by which the rights of the defendants are settled, is entitled to be paid out of the fund reasonable counsel fees for bringing the bill. *Louisiana Lottery Co. v. Clark*, 169
10. A court of equity has jurisdiction of a bill filed to recover the rents and profits of real estate which had been possessed in bad faith by a defendant and its grantees for a period of forty-five years, by which a discovery and the taking of an account, necessarily ramified and of complicated character, were prayed. *Gaines v. New Orleans*, 218

11. Where a municipal corporation, being a purchaser and possessor in bad faith, had sold and conveyed with warranty distinct parcels of the land possessed, for large sums of money, to several hundred grantees, against whom in one suit the real owner had obtained a decree establishing her title, *held*, that it was liable for rents and profits enjoyed by its grantees, and that a bill in equity would lie against it to recover the same, the said grantees being insolvent, and there being no privity between them and the real owner. *Ib.*
12. The fact that in a suit against a large number of persons the subpoenas for some of the defendants against whom decrees *pro confesso* had been taken were not found in the record, does not render the decrees on the merits against such defendants irregular and fraudulent. *Ib.*
18. Where decrees *pro confesso* had been set aside on condition that defendants should speed the cause which sought to enforce rights springing from an inheritance long in litigation, and in respect to which the controlling principles had been settled by the court of last resort, and where a part of the bill had, on demurrer, been declared by the court to be good, *held*, that it was within the discretion of the court, before answer, to order a reference to a master to state an account based upon that portion of the bill which had been sustained, provided such reference could be made without prejudice to the rights of the parties. *Ib.*
14. Where judgment creditors had filed their bill in the circuit court to subject to the payment of their debt a judgment recovered by their debtors against a third person, and process had been served upon all the defendants, and an injunction allowed forbidding the payment or collection of said judgment, but no receiver had been appointed: *Held*, that the complainants thereby acquired a lien in equity upon the judgment recovered by their debtors, which could not be affected by subsequent proceedings against the latter under the state insolvent laws. *Clafin v. Lisso*, 252.
15. Where a railroad company was threatening to construct its road upon such a route as would cross on the same plane the line of another railroad company at two points within a distance of two hundred and ninety feet, and less than a mile from another crossing of the same roads, so as to involve great danger of the collision of trains, *held*, that such construction should not be permitted, except under some paramount necessity for the service of the public or the state. *Missouri, etc., Ry Co. v. Texas & St. Louis Ry Co.*, 360.
16. The power of sale conferred on trustees in a deed of trust executed to secure a debt is not suspended by the insanity of the grantor, occurring after the execution of the deed, and a sale made during such insanity will not be avoided, although the insanity of the grantor was known to the trustees and the beneficiary of the deed. *Haggart v. Ranger*, 402.
17. Such sale, if made in pursuance of the directions of the deed of trust, will not be set aside on the ground of inadequacy of price, no fraud being charged. *Ib.*
18. In a suit to foreclose a junior mortgage and to set aside a sale and deed made upon the foreclosure of a prior mortgage executed by the same mortgagor, evidence that the first mortgage, and the debt which it secured, were transferred to the purchasers without consideration, will not avoid the decree of foreclosure and the sale made under it. *Saenger v. Nightingale*, 463.

19. A foreclosure and sale under a first mortgage, made in a suit brought, no party in interest objecting, in the name of the mortgagee, after the mortgage debt and mortgage had been transferred by him to another, is not void, and cannot be assailed on account of such transfer, by a junior mortgagee. *Ib.*
20. A junior mortgagee, in a suit brought by him to foreclose his mortgage against a purchaser at a foreclosure sale, made under a prior mortgage executed by the same mortgagor, cannot set up against the decree under which the foreclosure sale was made that the prior mortgage had been barred by the statute of limitations before the decree of foreclosure was made. *Ib.*
21. A contract in writing was made for the purchase of three different tracts of land for the gross sum of \$30,000. When the contract was carried into effect a separate deed was made for each tract, with a consideration named therein of \$10,000; one tract was paid for in full and a mortgage was given on the other two tracts to secure the balance due on them. *Held*, (1) That upon bill filed to foreclose the mortgage (on which \$5,000 remained due), the fraudulent representations of the vendor touching the value of the tract, not covered by the mortgage, could be set up by way of defense. (2) That such defense could be made against the heirs and distributees of the mortgagee. *Hicks v. Jennings*, 496
22. A mortgage executed by the defendant company to trustees to secure a large number of bonds, provided that upon default continuing for one month in the payment of interest, the trustees, on notice thereof, should be authorized to take possession of and sell the mortgaged premises. Before default certain of the bondholders filed their bill against the company, in which they alleged that it was insolvent; that it could not pay its debts and running expenses; that consequently the factory of the company would close and the operatives disperse, and that the company was about to make default in the payment of interest. The bill prayed for the appointment of a receiver, and that upon default in the payment of interest, the mortgage might be foreclosed and the property sold. The trustees and many of the stockholders were not made parties. Before any default in the payment of interest, a decree was made by consent of the parties for the sale of the mortgaged property, and it was accordingly sold. Several persons were deterred from bidding by reason of defects in the proceedings, and the property sold for about two-thirds of its value. *Held*, (1) That, the trustees not being parties to the suit, the absent bondholders were not bound by the decree. (2) That an indefeasible title could not be derived under the sale. (3) That under the circumstances the sale and the decree should be set aside, and the trustees allowed to become parties, so that the rights of all persons interested might be finally settled. *Coann v. The Atlanta Cotton Factory*, 503
23. According to the jurisprudence of Georgia, the transfer by delivery of a note payable to bearer carries with it the mortgage lien, so that the holder may foreclose in his own name without making the mortgagee a party. *Winstead v. Bingham*, 510
24. When legatees under a will were made defendants to a bill brought by other legatees against the executor to compel the payment of their legacies, and by the final decree such defendant legatees were authorized to file petitions in the case to propound their claims, *held*, that a decree against the executor, rendered in favor of such defendant legatees on the petitions which they were permitted to file, is not a bar to an action at law against the surety on the bond of the executor to recover the amount of such decree. *Bryan v. Alexander*, 529

25. A contract between two corporations not authorized but not forbidden by their charters will not, if executed, be overturned, but will be allowed to stand as the basis of the rights of the parties acquired thereunder. *Taylor v. South & North Alabama R. R. Co.*, 575
26. An executed contract constructively fraudulent, for the issue of preferred stock, made by a corporation in excess of its corporate powers, but not forbidden by law or against public policy, will not, after an acquiescence of ten years by the stockholders, be disturbed at their suit on the ground that it was *ultra vires*. *Ib.*
27. In a suit in equity to annul a contract for fraud, the party who seeks to escape the bar of the statute of limitations on the ground that he did not discover the fraud until within the time allowed by the statute for bringing the suit, must fully show the circumstances of the discovery, and that it could not, by the exercise of reasonable diligence, have been sooner made. *Ib.*
28. The holder of capital stock in a corporation, who has paid for it and claims it as his own, and has the certificate therefor, is not a trustee for other stockholders, so that the statute of limitations does not run in his favor. *Ib.*
29. Upon a bill of review the court will not consider errors of fact. *Brown v. White*, 614
30. The jurisdiction of the circuit courts of the United States of a bill in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest in property vested in such assignee, is not affected by the act of June 23, 1874, amendatory of the bankrupt act. *Ib.*
31. When there is a decree for complainant, all the issues raised by the pleadings, although not noticed in the decree, will be considered as decided in favor of complainant. *Ib.*
32. A decree will not be reversed upon bill of review for errors by which the complainant in review was not damaged. *Ib.*
33. When property of a bankrupt has been sold by order of the bankruptcy court, and its proceeds have been received, and neither the assignee nor the creditors have any further interest therein, and the bankrupt has been discharged, the district court sitting in equity will not interfere by injunction at the suit of the purchaser to prevent strangers to the bankrupt proceedings from enforcing in a state court their liens against the property sold, even though final distribution of the bankrupt's assets has not been made. *Adams v. Crittenden*, 618
34. The district court has jurisdiction of a bill in equity brought by creditors of an alleged firm against the assignee in bankruptcy of one of the individuals said to compose the firm, seeking to subject to the payment of the firm debts, assets held and claimed by the assignee as the individual property of the bankrupt, although both the complainants and the assignee are citizens of the same state. *Swan v. Sanborn*, 625
35. Creditors who have not reduced their claims to judgment and have no lien have no right to insist on payment out of any specific property of their debtor. *Ib.*

ESTATES OF DECEASED PERSONS.

The natural tutrix of minor children is, under the law of Louisiana, vested with authority to administer the succession of their deceased parent. *Thomas v. Parish of Tensas*, 187

ESTOPPEL.

1. A defendant in an action of trespass to try title who does not claim title through or under the plaintiff cannot be estopped by the declarations of plaintiff or any person under whom he claims. *Young v. Dunn*, 881
2. Under the code of Georgia, a draft drawn and indorsed by a married woman to pay the debt of her husband is absolutely void, even in the hands of a *bona fide* holder for value, and in a suit thereon the wife is not estopped to set up such defense by the fact that the draft recites that it was drawn for money loaned to her for her own benefit. *March v. Clark*, 460

EVIDENCE.

See BURDEN OF PROOF, 1. COMMON CARRIERS, 1, 4.

1. On final hearing of a suit in equity, *ex parte* affidavits taken before the cause was at issue cannot be admitted in evidence, especially where there has been no tender of the affiant for cross-examination, and no notice of an intention to offer the affidavits at the hearing. *Lilienthal v. Washburn*, 65
2. A document under private signature cannot be admitted in evidence until its execution has been proven. *Id.*
8. Proof of non-delivery by a common carrier of goods intrusted to him for transportation makes him *prima facie* liable. *Turnbull v. Citizens' Bank*, 192
4. According to the jurisprudence of Louisiana, if in a suit to recover rents and profits from a possessor in bad faith, evidence of the sums actually received is not through the fault of the defendant attainable, the court may take as a guide the rents and profits shown to have been received for the same period from other adjacent property of like value and of like capacity for producing rents and revenues. *Gaines v. New Orleans*, 213
5. A note payable to the order of a payee, who is described therein as "agent," may be sued on in his own name by the principal, who is the owner and holder thereof, without the indorsement of the payee. In such suit parol proof is admissible to show that the principal is the holder and owner of the note. *Pacific Guano Company v. Holleman*, 462
6. A defendant charged with the offense of smuggling submitted to the court his petition, verified by affidavit, showing that witnesses material to his defense were beyond seas, and praying for a *dedimus potestatem* to take their depositions, by virtue of section 866 of the Revised Statutes. *Held*, that the writ should issue, the question of the admissibility of the depositions being reserved till the trial. *United States v. Wilder*, 475
7. In case of conviction, such deposition might properly be considered by the court in imposing sentence. *Id.*
8. In a suit to foreclose a junior mortgage, and to set aside a sale and deed made upon the foreclosure of a prior mortgage executed by the same mortgagor, his letters are not admissible in evidence against himself and the purchasers at the foreclosure sale to show that the first mortgage had been satisfied before the decree of foreclosure was made, without evidence of a conspiracy between the mortgagor and the purchasers, who were assignees of the first

mortgage, to keep it open after it had been satisfied. *Saenger v. Nightingale*, 483

9. The rights of creditors of a municipal corporation cannot be prejudiced by the neglect of its council to keep proper minutes of their proceedings. What the council in fact did may be shown by evidence *aliunde* its record. *Bridgford v. The City of Tuscumbia*, 611

EXECUTION.

See ADMIRALTY, 17. PROCESS.

EXECUTORY PROCESS.

See RES JUDICATA, 8.

1. If an opposition is filed to an order of seizure and sale, the order becomes merely a process introductory to a litigation. *Boatmen's Savings Bank v. Wagenspack*, 130
2. After an order of seizure and sale has been granted in a state court and an opposition has been filed and an injunction obtained, and the cause is then removed to a court of the United States, the order may be reviewed by the latter court upon a rule to show cause why it should not be set aside. *Ib.*
3. But if the ground of opposition relates to the insufficiency or incompetency as proof of the authentic act of mortgage, the controversy should be considered only at the final hearing. *Ib.*

EXEMPTIONS.

See GARNISHMENT.

1. Where municipal bonds were exempted by law from taxation, the exemption was held to continue after they had been reduced to judgment. *De Vignier v. New Orleans*, 206
2. A city claimed title to a portion of the water front of its harbor by virtue of an act of the legislature, and its title thereto had been affirmed by the supreme court of the state. It claimed another portion by virtue of the dedication of the original proprietors. A litigation between the city and an incorporated wharf company touching the title to the harbor front was compromised by a consent decree, by which the city was invested with title to one-third of the stock in the wharf company. The compromise was approved by an act of the legislature, which declared that the stock should be held by the city as trustee for its present and future inhabitants, and should be exempt from sale for the city's debts. *Held*, that the stock could not be seized and sold for the debts of the city. *Hitchcock v. The Galveston Wharf Co.*, 295

EXPRESS COMPANIES.

See COMMON CARRIERS, 2, 3.

Articles 4256 and 4257, Revised Statutes of Texas, which establish reasonable maximum rates to be charged by railroad companies for the transportation of passengers and freight, do not apply to fares of express messengers or the freights of express matter. *Texas Express Co. v. Texas & Pacific Ry Co.*, 370

FAILURE OF CONSIDERATION.

See GIVING IN PAYMENT, 1, 2.

FIRE INSURANCE.

See INSURANCE.

FORFEITURE.

See STATUTES CONSTRUED, 29, 30.

FRAUD.

See ASSIGNMENT. EQUITY, 21. FRAUDULENT CONVEYANCES.

1. When the common council of a city had practically agreed upon the purchase of a fire engine, the fact that the mayor was paid by the seller for circulating among the tax-payers a petition in favor of the purchase, there being no concealment, and no corruption being shown, did not avoid the sale. *Bridgford v. The City of Tusculumbia*, 611
2. The fact that the purchaser at a tax sale was the deputy of the sheriff by whom the sale was made, does not render the sale *ipso facto* void, when it is not shown that the deputy had any part in making the sale, and there is no suggestion of any unfair practice or *mala fides* on his part in reference thereto. *O'Reilly v. Holt*, 645
3. The naked fact that the purchaser at a tax sale is clerk of the chancery court, in whose office the deed, to have effect, must be filed on the day of sale, does not render the sale absolutely void. *Ib.*

FRAUDULENT CONVEYANCES.

See ASSIGNMENT.

1. M., who was insolvent, conveyed to L., the mother of his wife, substantially all his property which was subject to execution, the alleged consideration being the payment of an account due from M. to L. Within two days thereafter, L., in consideration of natural love and affection, conveyed the same property to her daughter, the wife of M. *Held*, that these circumstances were indications of bad faith, and the deed executed by M. to L. could be sustained only on the ground that it was made for a valuable consideration and to pay an honest debt. *Clay v. McCally*, 605
2. The consideration for the conveyance made by M. to L., above mentioned, was an account said to be due from M. to L. for more than \$42,000. The account had been running for twenty-three years; no demand for the payment of it or any part of it had ever been made; some of the items were such as showed conclusively that their amount had been guessed at; others were for rent of land which L. did not own, but had previously conveyed to the wife of M., and for all it was evident that L. had not considered M. her debtor; no part of the account had ever been reduced to writing, and it was stated for the first time on the day the conveyance was made. *Held*, that the account was trumped up and fraudulent, and would not sustain the conveyance. *Ib.*

3. A conveyance of its property by an insolvent firm to pay the individual debts of its partners, contracted for money borrowed to be used, and in fact used, in the business of the firm, is a fraud on the creditors of the firm, and at their instance will be deemed void. *Goodbar v. Cary*, 668

FURNISHER OF SUPPLIES IN HOME PORT.

See ADMIRALTY, 40. LIENS, 2.

"FUTURES."

1. Promissory notes, the consideration of which is money advanced upon contracts made for the future delivery of cotton, and commissions for making such contracts, are valid and binding obligations. *Hentz v. Jewell*, 656
2. To render a contract for the future delivery of cotton or other commodity void as a gaming contract, there must be an understanding between the parties that there is to be no delivery, but that the contract is to be satisfied by the payment of the difference between the contract price and the market price at the time fixed for the delivery. *Ib.*

GAMING CONTRACT.

See CONTRACTS, 11.

GARNISHMENT.

When stock in an incorporated company standing in the name of a judgment debtor is by law not subject to execution, or is held by the debtor in trust, a court of law will not order a sale of the stock upon a writ of garnishment, and thus compel a resort to a court of equity to restrain the sale. *Hitchcock v. The Galveston Wharf Co.*, 295

GEORGIA.

See CONSTITUTIONAL LAW, 14, 15, 16, 17, 18. HUSBAND AND WIFE, 1, 2, 3. STATUTES CONSTRUED, 17, 18, 20.

GIVING IN PAYMENT.

1. In case of the delivery and acceptance of a specific thing in satisfaction of a debt, there is an implied understanding that the debtor guaranties his authority to dispose of the thing in that way; and a failure of his title will put the parties in their original relations to each other. But where there is a contrary understanding, the creditor is bound by the settlement, notwithstanding the failure of title. *Chapman v. Wilson*, 80
2. On the question of failure of consideration the eviction or decree of nullity must be final before it can constitute a ground of rescission. *Ib.*
3. Under the jurisprudence of Louisiana, whenever there is a sale, exchange or giving in payment of property, there is, unless waived by the contract, an implied warranty that the person so selling, ex-

changing or giving in payment is the owner of the thing sold, exchanged or given in payment. *Gaylor v. Copes*, 158

4. This rule applies when parties have settled their differences by a compromise, and property is transferred by one party to another in satisfaction of the compromise. *Ib.*

GRAND JURY.

See JURY, 1, 2.

HUSBAND AND WIFE.

See PRACTICE AT LAW, 8.

1. A deed for land in Georgia, made by a husband to a trustee in trust for the use and benefit of his wife, provided that the land conveyed should be free from the debts, contracts and liabilities of her husband, except such incumbrances and liens as by the written direction of the grantor and his wife might be placed thereon. *Held*, (1) That the power to incumber contained in said deed was not contrary to the code or policy of the state of Georgia. (2) That a mortgage upon the land, executed by the written direction of the grantor and his wife, was a valid incumbrance thereon. *Ætina Ins. Co. v. Brodinax*, 477
2. The provision for incumbrances in such deed is not inconsistent with the grant and does not render the deed void. *Ib.*
3. Under such a deed a valid mortgage could be made to secure a debt of the husband past due. *Ib.*

INDICTMENT.

1. An indictment under section 5515 of the Revised Statutes concluded *contra formam* the statute of the United States, and not also *contra formam* the statute of this state. *Held*, that the conclusion was proper and sufficient. *United States v. Bader*, 189
2. In an indictment, under section 5438, Revised Statutes, for presenting for approval a false claim against the government to an officer in the civil service of the United States, the averment that the claim was presented to T., then late marshal, he being then and there an officer in the civil service of the United States, is not repugnant, but is accurate and sufficient. *United States v. Strobach*, 592
3. An averment in such an indictment that said claim so presented was for services purporting to have been performed by a deputy marshal in a criminal proceeding before a commissioner of a United States circuit court, in which the United States was the plaintiff, and that it was a claim in favor of the late marshal against the United States, is sufficient to show that the said late marshal was the proper officer to whom said claim should be presented for approval. *Ib.*
4. The account of fees of a deputy marshal for services rendered by him is incorporated in the account of the marshal against the United States. Therefore the averment that the claim for fees of the deputy was one in favor of the marshal, and was presented to him for approval, is not absurd or repugnant. *Ib.*
5. An indictment under section 5438, which avers with the requisite certainty the presentation by the defendant for approval to an

officer in the civil service of the United States, with intent to defraud the United States, of a false, fictitious and fraudulent claim against the government of the United States, knowing the same to be such, covers every element of the offense prescribed in the section, and is sufficient. *Ib.*

INJUNCTION.

* See CONTRACTS, 3. EQUITY, 14. JURISDICTION, 6.

1. A motion for injunction *pendente lite*, to restrain the infringement of a patent, was heard upon the bill, affidavits and other proofs, before answer. *Held*, that upon the showing that the validity of the patent had been sustained by a decree of a court of the United States, and that the defendant had infringed, the injunction should issue. *Excavating Co. v. Lauman*, 139
2. That part of section 1, article X, of the constitution of Texas which declares: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-executing, but requires appropriate legislation to regulate the exercise of the right thereby conferred; and the exercise of such right may be restrained until, by negotiation or legal proceedings, it is established with proper limitations and conditions. *Missouri, etc., Ry Co. v. Texas & St. Louis Ry Co.*, 360
3. Where a railroad company was threatening to construct its road upon such a route as would cross on the same plane the line of another railroad company at two points within a distance of two hundred and ninety feet, and less than a mile from another crossing of the same roads, so as to involve great danger of the collision of trains, *held*, that such construction should not be permitted, except under some paramount necessity for the service of the public or the state. *Ib.*
4. As a general rule (the exceptions noted), where a cause has been removed from a state court to a court of the United States, the latter court cannot enjoin further proceedings in the case by the state court. *Missouri, etc., Railroad Co. v. Scott*, 386
5. An injunction allowed before the issues are made up or any testimony taken will be considered an injunction *pendente lite*. *Adams v. Crittenden*, 618
6. When property of a bankrupt has been sold by order of the bankruptcy court, and its proceeds have been received, and neither the assignee nor the creditors have any further interest therein, and the bankrupt has been discharged, the district court sitting in equity will not interfere by injunction at the suit of the purchaser to prevent strangers to the bankrupt proceedings from enforcing in a state court their liens against the property sold, even though final distribution of the bankrupt's assets has not been made. *Ib.*

INSANITY.

See EQUITY, 16.

INSURANCE.

1. The stipulations in a policy of fire insurance requiring that proof of loss should be made, and that sixty days should elapse after such proof before the loss was payable, and that, in case of difference

between the parties in respect to the amount of loss, that matter should be referred to arbitrators, and that no suit should be brought on the policy until their award was made, are conditions precedent to a suit on the policy. *Gauche v. London & Lancashire Ins. Co.*, 102

2. When by the terms of the policy the insurers were allowed sixty days after proof of loss within which they might reinstate the insured, the account and proof of loss furnished should, as far as practicable, give a detailed itemized statement of the loss. *Ib.*
3. The fact that the insurers have had in their possession since the loss the books of the insured, containing the invoices of the goods insured, or the fact that the insured have, at the instance of the insurers, been examined under oath in respect to the loss, will not relieve them from their obligation to furnish proof of loss. *Ib.*
4. When there is no evidence of the waiver of the proof of loss, or of the destruction of the books of the assured, or other means necessary to make it out, the question of the sufficiency of the proof of the loss is one of law. *Ib.*
5. When an insurance company objected to several proofs of loss successively presented by the insured, and insisted that the stipulations of the policy in respect thereto should be exactly complied with, it could not be held to have waived the proofs, even though those presented were made out as required by the policy. *Ib.*
6. A policy of insurance upon a vessel bound to New Orleans, which was her home port, contained these clauses, the first written, and the second printed:
 "To navigate the Atlantic ocean, between Europe and America, to be covered in port and at sea."
 "Warranted by the assured not to use port or ports in eastern Mexico, Texas nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports of the West India islands between July 15th and October 15th."
Held, that the policy covered the loss of the vessel in the Gulf of Mexico, the conduct of the insurers showing such to be their construction of the policy. *The Orient*, 255

INTENT.

See STATUTES CONSTRUED, 29.

INTEREST.

See ADMIRALTY, 16.

INTERPLEADER.

See EQUITY, 9.

JUDGMENT.

See EQUITY, 14. RES JUDICATA.

- A judgment is binding on a warrantor if he has been called in warranty, or has been apprised of the bringing of the suit. *Gaines v. New Orleans*, 218

JUDICIAL NOTICE.

The courts of the United States take judicial notice of the public treaties between the United States and foreign countries. *Lacroix v. Sarrazin*, 174

JURISDICTION.

See EQUITY, 11. REMOVAL OF CAUSES, 2, 8, 6. TAXATION, 1. WHARFAGE, 2.

1. The circuit court of the United States for the district of Louisiana has not original jurisdiction of a bill filed by the heirs at law of a testator, to set aside a decree of the probate court of the parish of Orleans, admitting a will to probate and record, and recognizing the legatee therein named as the testator's sole and universal legatee. *Ellis v. Davis*, 6
2. Where there is not an adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the state in the state courts. *National Bank of New Orleans v. Bohné*, 74
3. The power to control their own process so as to prevent injustice is one which belongs to all courts. *The Sabine*, 83
4. If a contract is maritime in its nature and effect, it will be enforced by the admiralty courts of the United States, though it may not be considered a maritime contract in the courts of the country where it is made. *Maurv v. Culliford*, 118
5. A maritime lien is not essential to give jurisdiction to courts of admiralty. *Ib.*
6. A circuit court of the United States has jurisdiction, without regard to the citizenship of the parties, of a bill filed by a water-works company having by its charter the exclusive right of supplying a city with water, to restrain another company organized under a general law of the legislature from erecting competing water-works. *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 134
7. The statutes of Louisiana, which require all claims against decedents' estates to be presented to the mortuary court, operate only on the state courts, and do not prevent the revivor against the personal representative of a deceased defendant of a suit brought in the circuit court of the United States. *Fitzpatrick v. Domingo*, 163
8. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the partners can be individually charged only through the partnership. *Liverpool Navigation Co. v. Agar*, 201
9. Under the law of Louisiana a commercial partnership, so far as the question of jurisdiction is concerned, stands in the same category as a corporation. Therefore a court of the United States has jurisdiction of a suit brought by an alien against a commercial partnership domiciled in Louisiana, one of whose partners is also an alien, and the other a citizen of Louisiana, upon an obligation originating in Louisiana. *Ib.*
10. A court of equity has jurisdiction of a bill filed to recover the rents and profits of real estate which had been possessed in bad faith by a defendant and its grantees for a period of forty-five years, by

- which a discovery and the taking of an account, necessarily ramified and of complicated character, were prayed. *Gaines v. New Orleans*, 218
11. The courts of the United States have jurisdiction of a suit between citizens of the same state without regard to the defenses set up, or to be set up, in the answer, which, upon the face of the petition, is one arising under the constitution or laws of the United States. *Sawyer v. Parish of Concordia*, 273
 12. When the plaintiff in a court of the United States insists in his petition that an act of the state legislature impairs the obligation of the contract in which his suit is brought, and is therefore void, the fact that the state supreme court has held the act to be unconstitutional and void does not oust the jurisdiction of the United States courts. *Ib.*
 13. The jurisdiction of any court may be challenged in any other court where its judgments or decrees are relied on. *Adams v. Terrell*, 337
 14. The bankruptcy court acquires no jurisdiction over the individual estate of a deceased partner by a proceeding against the late firm of which he was a member. *Ib.*
 15. Where a right of way over private property, or the right of crossing a public highway, has been acquired, certain common rights attach to the acquisition, which may be protected and enforced between proper parties in a court of the United States; but to acquire such rights, resort must be had to the courts of the state. *Missouri, etc., R'y Co. v. Texas & St. Louis R'y Co.*, 360
 16. The jurisdiction of the courts of the states to punish the passing, etc., of counterfeit coin with intent to defraud has not been excluded, but has been reserved and recognized, by the legislation of congress. *Ex parte Geisler*, 381
 17. The jurisdiction of the circuit court of the United States of a bill in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest in property vested in such assignee, is not affected by the act of June 22, 1874, amendatory of the bankrupt act. *Brown v. White*, 614
 18. The district court has jurisdiction of a bill in equity brought by creditors of an alleged firm against the assignee in bankruptcy of one of the individuals said to compose the firm, seeking to subject to the payment of the firm debts, assets held and claimed by the assignee as the individual property of the bankrupt, although both the complainants and the assignee are citizens of the same state. *Swan v. Sanborn*, 625

JURY.

See CONSTITUTIONAL LAW, 19, 20. WAIVER.

1. A writ of *venire facias* is, under the statutes of the United States, indispensable to the summoning of a legal grand jury. *United States v. Antz*, 174
2. A plea to an indictment which alleged that when the names of the grand jurors by whom the indictment was found were drawn from the jury-box, it contained the names of three hundred and three persons only, and that of these three were disqualified and three were dead, is insufficient and bad. *United States v. Rondeau*, 185

JUSTICE OF THE PEACE.

See STATUTES CONSTRUED, 25.

KNOWLEDGE.

See NOTICE, 2.

LEGISLATIVE POWER.

1. The power to regulate railroad freights and passenger tariffs being conferred by the constitution of Georgia upon the legislature, the question, what are just and reasonable rates, is a legislative and not a judicial one. *Tilley v. The Railroad Commissioners*, 427
2. The legislature does not lose its right to modify or repeal the charter of a railroad company because the company had issued its bonds and secured them by a mortgage upon its property at a time when the state was a stockholder, and because the stock of the state had been voted in favor of the execution of the bonds and mortgage. *Ib.*
3. Legislation which abrogates or limits the power of taxation granted to a municipal corporation, upon the faith of which contracts were made by it, and without which they cannot be enforced, is invalid and void. *United States ex rel. v. Port of Mobile*, 536

LIABILITY OF STOCKHOLDER IN NATIONAL BANK.

- A person who purchases the stock of a national bank with his own means and for his own account, but has it transferred on the books of the bank from the seller to a third person, does not thereby escape the liability of a stockholder for the debts of the bank. *Case v. Small*, 78

LIBEL IN REM.

See ADMIRALTY, 28.

LIENS.

See ADMIRALTY, 22. EQUITY, 14, 85. PLEDGE, 2.

1. A contract by a vessel engaged in making regular trips between two ports, for the employment of a purser for a year, gives the party employed a lien for his wages for the entire year, and if discharged without cause before the end of his term of service, he may enforce his lien against the vessel. *The Wanderer*, 25
2. The owner of a steamboat who has chartered her to another is a "third person" within the meaning of art. 3274 of the civil code of Louisiana; and one who furnishes supplies to the boat in her home port, during the life of the charter-party, cannot assert a lien against her after she has been returned to her owner, unless he has recorded his lien according to law. *The Cara*, 28
3. A Louisiana corporation organized under a general law of the state cannot, by its private charter and by-laws adopted for its own government, create a privilege on property actually and necessarily within commerce. *New Orleans Banking Association v. Wiltz*, 43

4. Under art. 123 of the constitution of Louisiana of 1868, a privilege on stock was required to be recorded in the registers of mortgages, liens and privileges to have any effect against third persons. *Ib.*
5. There can be no maritime lien on a vessel founded on an unexecuted contract to furnish towage. *The Prince Leopold*, 48
6. A maritime lien is not essential to give jurisdiction to courts of admiralty. *Maury v. Culliford*, 118
7. The lien for salvage and for damage to goods is inferior to the lien of seamen for wages earned on a voyage subsequent to that on which the claims for salvage and damage arose. *The Lillie Laurie*, 313
8. Claims, which are liens by the general maritime law, are entitled to priority of payment over claims of mortgagees, whether their mortgages were registered before or after the origin of the maritime liens. *Ib.*
9. Liens for salvage and for damages, upon a contract of affreightment, are entitled to priority of payment over debts subsequently contracted for supplies furnished in the home port, and which are a lien upon the vessel by virtue of state law only. *Ib.*

LIGHTERAGE.

A charter-party provided as follows: The cargo (iron rails) "is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, and being so loaded, she shall proceed to Galveston Bay, or so near thereto as she may safely get." Lighterage was notoriously necessary at the port of Galveston. *Held*, that the ship was not bound to pay lighterage for discharging the cargo. *Carr v. Austin & Northwestern R. R. Co.*, 327

LIGHTS.

See ADMIRALTY, 13.

LIMITATIONS.

1. Although courts of equity are not strictly bound by the local laws of prescription, yet they generally follow the analogy of those laws and refuse to enforce claims that have become stale by the lapse of the prescribed period. *Chapman v. Wilson*, 30
2. But in cases of peculiarly equitable cognizance regard is always paid to the force of special circumstances. *Ib.*
3. By the local law of Louisiana actions for nullity or rescission of contracts are prescribed by the lapse of five years. *Held*, that a bill in equity to set aside a settlement on the ground of fraudulent concealment, which was not filed until twelve years after the settlement, and nine years after the discovery of the alleged fraud, should, under the circumstances of this case, be dismissed on account of unreasonable laches and the staleness of the claim. *Ib.*
4. When a debt was paid in certain bonds which were afterwards decided by the court of last resort to be invalid and not the genuine obligations of the party by which they purported to have been issued, *held*, that the prescription of five and ten years did not begin to run against the debt until said decision. *Gaylor v. Copes*, 158.

5. A suit for the rents and profits of lands, held by a possessor in bad faith, cannot be commenced, and the prescription against the demand does not begin to run, until the plaintiff has recovered judgment for the possession of the lands. *Gaines v. New Orleans*, 213
6. Where the adjudication in bankruptcy is void, parties who bought property at the bankruptcy sale cannot protect their title by the two years' limitation prescribed by the second section of the bankrupt act. *Adams v. Terrell*, 337
7. A junior mortgage in a suit brought by him to foreclose his mortgage against a purchaser at a foreclosure sale, made under a prior mortgage executed by the same mortgagor, cannot set up against the decree under which the foreclosure sale was made that the prior mortgage had been barred by the statute of limitations before the decree of foreclosure was made. *Sawyer v. Nightingale*, 483
8. A suit brought by a legatee against a surety on the bond of an executor is not, under the limitation law of Alabama, barred in six years from the date of a decree of the probate court merely ascertaining the amount due the legatee, but making no valid order directing its payment. *Bryan v. Alexander*, 529
9. When legatees under a will were made defendants to a bill brought by other legatees against the executor to compel the payment of their legacies, and by the final decree such defendant legatees were authorized to file petitions in the case to propound their claims, held, that the statute of limitations did not begin to run against them from the date of such final decree. *Ib.*
10. A suit in equity, brought against a bankrupt and his assignee in bankruptcy, to foreclose a mortgage executed by the bankrupt, is not barred by the limitation prescribed by section 5057 of the Revised Statutes. *Gildersleeve v. Gaynor*, 541
11. An executed contract constructively fraudulent, for the issue of preferred stock, made by a corporation in excess of its corporate powers, but not forbidden by law or against public policy, will not, after an acquiescence of ten years by the stockholders, be disturbed at their suit on the ground that it was *ultra vires*. *Taylor v. South & North Alabama R. R. Co.*, 576
12. In a suit in equity to annul a contract for fraud, the party who seeks to escape the bar of the statute of limitations on the ground that he did not discover the fraud until within the time allowed by the statute for bringing the suit, must fully show the circumstances of the discovery, and that it could not, by the exercise of reasonable diligence, have been sooner made. *Ib.*
18. The holder of capital stock in a corporation, who has paid for it and claims it as his own, and has the certificate therefor, is not a trustee for other stockholders, so that the statute of limitations does not run in his favor. *Ib.*

LIS PENDENS.

The pendency of a suit in a state court for the foreclosure of a mortgage is not a bar to a suit in the circuit court of the United States between the same parties for the foreclosure of the same mortgage. *Weaver v. Field*, 153

MALICIOUS PROSECUTION.

See MARRIED WOMAN.

The agent of a railroad company charged with the supervision of its lands, the making of leases and contracts of sale, the collection of rents and "stumpage," instituted a criminal prosecution for the larceny of timber cut on said lands, which resulted in the acquittal of the accused. *Held*, that the act of the agent in instigating the prosecution was not within the scope of his agency, and the railroad company was not liable in a suit for malicious prosecution unless it was shown that the act of the agent in instituting the prosecution had been authorized or ratified by it. *Préssley v. Mobile, etc., R. R. Co.*, 599

MANDAMUS.

1. In Texas it is permissible practice to make an alternative writ of *mandamus* returnable to the same term in which it was issued. *Hitchcock v. Galveston*, 808
2. Service upon the mayor of an alternative writ of *mandamus*, issued in fact against the city, but directed to the mayor and aldermen, is a good service. *Ib.*
3. Where the judgment creditor of a city, in order to satisfy his judgment, had garnished stocks owned by the city more than sufficient to pay it, and the question whether said stocks could be subjected to the payment of the city's debts was still pending on appeal, *held*, that the creditor was not entitled to the writ of *mandamus* requiring the officers of the city to levy and collect a tax to pay his judgment. *Ib.*
4. An act of the legislature changed the name and reduced the territorial limits of a municipal corporation, changed the designation and duties of its officers, transferred its property to commissioners and a court of chancery, to be used for the settlement and payment of its debts, and placed a limit on the rate of taxation. *Held*, that the proper officers of the corporation might be compelled by *mandamus* to levy and collect a tax to pay a judgment recovered against it under its new name, on its bonds issued before such act was passed. *United States ex rel. v. Port of Mobile*, 536

MARITIME LIENS.

See LIENS, 1, 2, 5.

MARRIED WOMAN.

See ESTOPPEL, 2. PRACTICE IN EQUITY, 3.

In Louisiana a suit to recover damages for the malicious prosecution of a married woman must be brought in the name of the husband, even though the husband and wife were married and are domiciled in another state. *Myerson v. Alter*, 126

MARSHAL.

See INDICTMENT, 2, 3, 4, 5

The marshal is, within the meaning of section 5488, Revised Statutes, an officer to whom it is an offense, punishable by that section, for a deputy marshal to present for approval a false claim for fees. *United States v. Strobach*, 592

MISSISSIPPI.

See STATUTES CONSTRUED, 84, 85, 86, 87.

MORTGAGE.

See ADMIRALTY, 39.

1. In a suit to foreclose a junior mortgage, and to set aside a sale and deed made upon the foreclosure of a prior mortgage executed by the same mortgagor, evidence that the first mortgage, and the debt which it secured, were transferred to the purchasers without consideration, will not avoid the decree of foreclosure and the sale made under it. *Saenger v. Nightingale*, 483
2. A foreclosure and sale under a first mortgage, made in a suit brought, no party in interest objecting, in the name of the mortgagee, after the mortgage debt and mortgage had been transferred by him to another, is not void, and cannot be assailed on account of such transfer, by a junior mortgage. *Ib.*
3. A junior mortgagee, in a suit brought by him to foreclose his mortgage against a purchaser at a foreclosure sale, made under a prior mortgage executed by the same mortgagor, cannot set up against the decree under which the foreclosure sale was made, that the prior mortgage had been barred by the statute of limitations before the decree of foreclosure was made. *Ib.*
4. A contract in writing was made for the purchase of three different tracts of land for the gross sum of \$30,000. When the contract was carried into effect, a separate deed was made for each tract, with a consideration named therein of \$10,000; one tract was paid for in full, and a mortgage was given on the other two tracts to secure the balance due on them. *Held*, (1) That upon bill filed to foreclose the mortgage (on which \$5,000 remained due), the fraudulent representations of the vendor touching the value of the tract, not covered by the mortgage, could be set up by way of defense. (2) That such defense could be made against the heirs and distributees of the mortgagee. *Hicks v. Jennings*, 496
5. According to the jurisprudence of Georgia, the transfer by delivery of a note payable to bearer, carries with it the mortgage lien, so that the holder may foreclose in his own name without making the mortgagee a party. *Winstead v. Brigham*, 510
6. Section 1996 of the code of Georgia does not apply to mortgages. *Ib.*
7. A suit in equity, brought against a bankrupt and his assignee in bankruptcy, to foreclose a mortgage executed by the bankrupt, is not barred by the limitation prescribed by section 5057 of the Revised Statutes. *Gildersleeve v. Gaynor*, 541

MUNICIPAL BONDS.

See EXEMPTIONS. TAXATION, 2.

An act of the legislature changed the name and reduced the territorial limits of a municipal corporation, changed the designation and duties of its officers, transferred its property to commissioners and a court of chancery, to be used for the settlement and payment of its debts, and placed a limit on the rate of taxation. *Held*, that the proper officers of the corporation might be compelled by *mandamus* to levy and collect a tax to pay a judgment recovered against it under its new name, on its bonds issued before such act was passed. *United States ex rel. v. Port of Mobile*, 536

MUNICIPAL CORPORATIONS.

See EQUITY, 11. FRAUD. MUNICIPAL BONDS.

The rights of creditors of a municipal corporation cannot be prejudiced by the neglect of its council to keep proper minutes of their proceedings. What the council in fact did may be shown by evidence *aliunde* its record. *Bridgford v. The City of Tuscumbia*, 611

NATIONAL BANKS.

See LIABILITY OF STOCKHOLDER IN NATIONAL BANK.

The comptroller of the currency has no authority to settle and compound suits brought by the receiver of a national bank, without leave of the court in which the suits are pending. *Case v. Small*, 78

NEGLIGENCE.

See ADMIRALTY, 28, 45. COMMON CARRIER, 5.

1. A person receiving injuries by a collision with a train at a railroad crossing must show that the accident occurred without carelessness or default on his part, and that it was brought about by the negligence or misconduct of the servants of the railroad company. *Tucker v. Duncan*, 652
2. Unless the injury is caused by the defendant's gross negligence or wilful act, the plaintiff cannot recover, if his own negligence directly or proximately contributed to produce the result. *Ib.*

NEW TRIAL.

In a case where the testimony was conflicting, there had been two concurring verdicts, the first of which had been set aside as against the weight of the evidence. *Held*; that the court ought not to grant a second new trial on the same ground, there being no offer to produce new testimony. *Milliken v. Ross*, 69

NOTES AND BILLS.

See ESTOPPEL, 2. EQUITY, 5. CONTRACTS, 10.

1. A promissory note in the usual form, but containing this further stipulation, "in case of legal proceedings on this note we agree to pay ten per cent. of the amount for attorney's fees," is a negotiable instrument under the law merchant, and the *bona fide* indorsee can enforce the stipulation against the makers. *Adams v. Addington*, 389
2. The *bona fide* indorsee of a promissory note who has sued in the same action both the maker and indorser may discontinue the suit as against the indorser, notwithstanding an issue raised by the maker that the indorser obtained the note from him by fraud. *Ib.*
3. A note payable to the order of a payee, who is described therein as "agent," may be sued on in his own name by the principal, who is the owner and holder thereof, without the indorsement of the payee. *Pacific Guano Company v. Holleman*, 462

4. In such suit parol proof is admissible to show that the principal is the holder and owner of the note. *Ib.*

NOTICE.

See ADMIRALTY, 35. CONTRACTS, 1. JUDICIAL NOTICE. PARTNERSHIP, 6. TRADE-MARK.

1. Where one partner fraudulently indorses the name of his firm upon commercial paper in which the partnership has no property or interest, and obtains money upon it, manifestly for his own and not for partnership use, the party with whom he deals is affected with notice, and cannot hold the firm. *Newman v. Richardson*, 81
2. Where two members of a firm are the president and cashier, respectively, of a bank, their knowledge of the insolvency of the firm is the knowledge of the bank. *Nisbet v. The Macon Bank & Trust Co.*, 464

ORDER OF SEIZURE AND SALE.

See EXECUTORY PROCESS.

PARTIES.

See STATUTES CONSTRUED, 12, 13. EQUITY, 22.

A suit in equity brought by a mortgagee to set aside a fraudulent conveyance of the land covered by his mortgage, and to foreclose the mortgage, is well brought in his own name, notwithstanding the fact that the mortgagor since the fraudulent conveyance has been adjudicated a bankrupt and an assignee of his estate has been appointed. *Banking Association v. Le Breton*, 203

PARTNERS.

See PARTNERSHIP.

1. Where one partner fraudulently indorses the name of his firm upon commercial paper in which the partnership has no property or interest, and obtains money upon it, manifestly for his own and not for partnership use, the party with whom he deals is affected with notice, and cannot hold the firm. *Newman v. Richardson*, 81.
2. Where one of two partners devised certain property to the partnership of which he was a member, and died, *held*, that the surviving partner took only an equitable estate in the property so devised. *Young v. Dunn*, 331

PARTNERSHIP.

See BANKRUPTCY, 2. PARTNERS.

1. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the partners can be individually charged only through the partnership. *Liverpool Navigation Co. v. Agar*, 201
2. Under the law of Louisiana a commercial partnership, so far as the question of jurisdiction is concerned, stands in the same category as a corporation. Therefore a court of the United States has juris-

- diction of a suit brought by an alien against a commercial partnership domiciled in Louisiana, one of whose partners is also an alien, and the other a citizen of Louisiana, upon an obligation originating in Louisiana. *Ib.*
8. Where the owners of several steamboats are not in fact partners, and neither own nor use them in common, and there is no community of profits, but they allow their boats to be advertised as forming a line under a common name, and employ a common agent, who solicits custom and transacts business for all the boats, *held*, that no one of the boats or its owner is liable for the contracts or torts of the others. *Citizens' Ins. Co. v. Kountz Line*, 293
4. The bill of lading issued to a shipper by one of the boats composing such line, made out in her own name, is notice, and amounts to a contract that the boat by which it was issued should be alone bound. *Ib.*
5. A contract between the firm of K. & H., carrying on a banking and brokerage business in Savannah, Georgia, and S., of Quincy, Florida, whereby the latter agreed to open a store in Quincy for the sale for cash or its equivalent in salable commodities of goods belonging to K. & H., and to devote his whole time to the business, and in consideration for his services S. was "to be entitled to have and receive an amount of money equivalent to one-half of the net profit on the sales actually made," does not provide for such a community of profits as would by operation of law constitute a partnership as to third persons between K. & H. and S. *Einstein v. Gourdin*, 415
6. A partnership as to third persons can only arise either by contract between the partners themselves, by implication of law arising from a contract which does not make them partners as to each other, but does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists. *Ib.*
7. The United States recovered a judgment against three persons. Two of the judgment debtors had been partners, and had as such been adjudicated bankrupt. The judgment was for the individual debt of one of the partners, the two other judgment debtors being his sureties. *Held*, (1) That the United States was entitled to priority of payment out of the partnership as well as individual assets of the partners, over all creditors, whether partnership or individual. (2) That the government is not limited as to its choice of remedies or of funds liable to its claims. Therefore the assumption that the United States ought first to pursue its remedy against the surety, who was not a member of the firm, before coming on the partnership assets, was not tenable. *In re A. & H. Strassburger*, 557
8. One who is not in fact a partner in a firm cannot be made such as to third persons by the acts or declarations of his alleged partners of which he has no notice. *Swann v. Sanborn*, 625
9. S. loaned money to C. to be invested in business by him, and agreed to take in lieu of an interest therein a certain share of the profits of the business. *Held*, that persons who became creditors of C. after this arrangement was ended, and who had never heard of it, could not hold S. as a partner. *Ib.*
10. C. owned all the property by which a business was carried on, but, with his knowledge, two other persons held themselves out as his partners in the business, though they were not in fact such. *Held*, that these representations did not divest C. of his exclusive title to

the property, and his individual creditors were entitled to have it applied first to the payment of their debts. *Ib.*

11. A conveyance of its property by an insolvent firm to pay the individual debts of its partners, contracted for money borrowed to be used, and in fact used, in the business of the firm, is a fraud on the creditors of the firm, and at their instance will be deemed void. *Goodbar v. Cary*, 663

PATENTS.

1. The specification of an original patent pointed out a certain material to be used, and declared that its sole utility and availability consisted in two of its properties. The reissued patent substituted other materials, naming those only which possessed the same two properties. *Held*, that there was no expansion of the patent, and that the reissue was valid. *Dunbar v. White*, 116
2. A patentee whose letters patent had more than sixteen years to run, sold the exclusive right to J. S. to use, and license others to use, for the period of five years, the invention described in the patent. *Held*, that the patentee could, during said period of five years, maintain an action against an infringer. *Still v. Reading*, 345
3. In such an action the petition should allege that the defendant had no authority from J. S. to use the invention. *Ib.*
4. The first and fourth claims of reissued letters patent No. 6,169 of Peter C. Sawyer are either repugnant, or they do not describe with the requisite clearness and certainty the inventions intended to be covered thereby. *Sawyer v. Miller*, 473
5. A combination to be patentable must produce a different force or effect or result from that produced by the separate parts of which the combination consists. *Ib.*

PAYMENT.

See DESTRUCTION OF PROPERTY UNDER SEIZURE BY JUDICIAL PROCESS.

PLEADING.

See PATENTS, 3. PLEAS IN BAR.

The constitution of Georgia provides: "the court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation." *Held*, that in a suit on a promissory note, a plea denying the title of the plaintiff to the note is such issuable defense, although, if true, it may also show that the court is without jurisdiction. *Lanning v. Lockett*, 455

PLEA IN BAR.

1. Where, in a suit to recover a tract of land, the defendant disclaims any title or possession thereof, except as to a certain part particularly described, and there is judgment against him as to that part, but the court enters no judgment as to the portions disclaimed, *held*, that such suit is no bar to another suit against the same defendant to recover rents and profits for the parcel for which the disclaimer was made. *Gaines v. New Orleans*, 213

2. Neither is the decision of the court in such a case, made upon exceptions to the master's report, that the defendant could not be treated as a trustee for the plaintiff for the price received by him for the sale of the lands disclaimed, a bar to another suit to recover the rents and profits of the lands embraced in the disclaimer. *Ib.*
3. When legatees under a will were made defendants to a bill brought by other legatees against the executor to compel the payment of their legacies, and by the final decree such defendant legatees were authorized to file petitions in the case to propound their claims, *held*, that a decree against the executor, rendered in favor of such defendant legatees on the petitions which they were permitted to file, is not a bar to an action at law against the surety on the bond of the executor to recover the amount of such decree. *Bryan v. Alexander*, 529

PLEA TO INDICTMENT.

See JURY, 2.

PLEDGE.

See LIENS, 3, 4.

1. Under the law of Louisiana, stock in an incorporated company is property which can be pledged by contract and delivery of the stock certificate. *National Banking Association v. Wiltz*, 43
2. The pledgee takes stock so pledged subject to all the liens and privileges which the law imposes on it, and no others. *Ib.*
3. A pledge cannot be made of stock in a bank by merely delivering to the pledgee the stock certificate; but there must be a transfer of the stock to the pledgee, on the books of the bank, or the delivery of the stock certificate must be accompanied by a power of attorney, authorizing a transfer of the stock, or by some assignment or contract in writing, by which the pledgee may assert title or compel a transfer. *Nisbet v. The Macon Bank & Trust Co.*, 464
4. A firm, two of whose members were the president and cashier, respectively, of a bank, agreed verbally with the directors to secure the bank for such balances as might from time to time be due it from the firm, by the pledge of the firm's certificates of stock in the bank. Stock certificates were accordingly placed, by the member of the firm who was cashier of the bank, in a separate box under his control, in the vault of the firm. The firm retained and exercised the right, without leave of the bank, of selling and assigning the stock, and of withdrawing the certificates and substituting others therefor. The bank had no power to sell the stock or assign the certificates. *Held*, that this did not constitute such a pledge of the stock represented by the certificates as would be valid against an assignee in bankruptcy of the firm. *Ib.*

PLEDGEE.

See PLEDGE, 2.

POLICE POWER.

1. Private property cannot be taken or vested rights impaired by the legislature without compensation, upon the claim that the acts are done in the exercise of the police power of the state. *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 134

2. According to the principles of general jurisprudence, private property cannot be taken or damaged for public use without compensation, either by authority of the police powers of the state, or under the right of eminent domain. *Hollingsworth v. Parish of Texas*, 230

POSSESSOR IN BAD FAITH.

See EQUITY, 10. LIMITATIONS, 5.

1. Where a municipal corporation, being a purchaser and possessor in bad faith, had sold and conveyed with warranty distinct parcels of the land possessed, for large sums of money, to several hundred grantees, against whom in one suit the real owner had obtained a decree establishing her title, *held*, that it was liable for rents and profits enjoyed by its grantees, and that a bill in equity would lie against it to recover the same, the said grantees being insolvent, and there being no privity between them and the real owner. *Gaines v. New Orleans*, 213
2. A possessor in bad faith, who employs the process and machinery of the courts with the purpose of depriving another of what he knows is justly his, is under obligation to satisfy all damages which that other may thereby suffer. *Ib.*
3. Such obligation of the possessor in bad faith is not diminished by the fact that it has raised and conducted defenses in the capacity of a warrantor. *Ib.*
4. A possessor in bad faith is liable not only for rents and revenues and values for use actually received, but also for those which might have been received with ordinary good management. *Ib.*
5. When a defendant has, in bad faith, kept the plaintiff, who is the true owner, out of possession of her property, known by it to belong to her, its liability is not limited by the redress given against those to whom the possessor in bad faith has sold and warranted the property, but extends to all the loss which she has suffered for the entire period during which she has been kept out of possession. *Ib.*

PRACTICE IN ADMIRALTY.

See ADMIRALTY, 17, 29.

1. The district court dismissed the libel of a salvor for salvage, and rendered decrees in favor of the furnishers of supplies in the home port, each of the decrees being for a less sum than \$50, and therefore not subject to appeal. The proceeds of the vessel were insufficient to pay the claim for salvage and the decrees for supplies. The salvor appealed to the circuit court, and pending his appeal the decrees rendered by the district court for supplies were paid in full out of the proceeds of the vessel. *Held*, that the decrees were improvidently paid, and that the question, which was entitled to priority of payment, the salvor or the furnishers of supplies, was carried up by the appeal of the former. *The Lillie Laurie*, 312
2. The district court, upon an *ex parte* hearing, no claimant having appeared, dismissed a libel of information for the forfeiture of imported goods. *Held*, on appeal, that as the record did not set out the proofs upon which the court acted, no ground appeared for reversing its decree. *The United States v. Ninety Demijohns of Rum*, 637

PRACTICE IN EQUITY.

See EQUITY, 22.

1. On final hearing of a suit in equity, *ex parte* affidavits taken before the cause was at issue cannot be admitted in evidence, especially where there has been no tender of the affiant for cross-examination, and no notice of an intention to offer the affidavits at the hearing. *Lilienthal v. Washburn*, 65
2. Where it appeared from the bill, which was sworn to, that the court had jurisdiction of the case, and a sworn plea was filed which admitted the material averments of the bill, but stated facts on which the jurisdiction was denied, but to sustain which no competent proof was offered, and there was no other defense, *held*, that there should be such decree for complainant as was warranted by the averments of the bill. *Ib.*
3. A subpoena in chancery against a married woman may be served in Louisiana at the domicile of the husband, there being no legal separation between him and his wife. *Oglesby v. Sillom*, 72
4. The power to control their own process so as to prevent injustice is one which belongs to all courts. *The Sabine*, 83
5. Upon a bill to impeach a judgment at law and for a new trial, a substituted service of subpoena was ordered. *Held*, (1) That the case was one in which substituted service was proper, and the court would proceed without actual service of subpoena on defendant. (2) That an amendment to the bill by which complainants sought to charge the defendant as trustee made a new case, in which the defendant was not properly before the court, and the amendment should be stricken from the files. *Oglesby v. Attrill*, 114
6. If an opposition is filed to an order of seizure and sale, the order becomes merely a process introductory to a litigation. *Boatmen's Savings Bank v. Wagenspack*, 130
7. After an order of seizure and sale has been granted in a state court, and an opposition has been filed and an injunction obtained and the cause is then removed to a court of the United States, the order may be reviewed by the latter court upon a rule to show cause why it should not be set aside. *Ib.*
8. But if the ground of opposition relates to the insufficiency or incompetency as proof of the authentic act of mortgage, the controversy should be considered only at the final hearing. *Ib.*
9. Where decrees *pro confesso* had been set aside on condition that defendants should speed the cause which sought to enforce rights springing from an inheritance long in litigation, and in respect to which the controlling principles had been settled by the court of last resort, and where a part of the bill had, on demurrer, been declared by the court to be good, *held*, that it was within the discretion of the court, before answer, to order a reference to a master to state an account based upon that portion of the bill which had been sustained, provided such reference could be made without prejudice to the rights of the parties. *Gaines v. New Orleans*, 213
10. An injunction allowed before the issues are made up or any testimony taken will be considered an injunction *pendente lite*. *Adams v. Crittenden*, 618

PRACTICE AT LAW.

See GARNISHMENT.

1. In a case where the testimony was conflicting, there had been two concurring verdicts, the first of which had been set aside as against the weight of the evidence. *Held*, that the court ought not to grant a second new trial on the same ground, there being no offer to produce new testimony. *Milliken v. Ross*, 69
2. The power to control their own process, so as to prevent injustice, is one which belongs to all courts. *The Sabine*, 88
3. In Louisiana a suit to recover damages for the malicious prosecution of a married woman must be brought in the name of the husband, even though the husband and wife were married and are domiciled in another state. *Myerson v. Atter*, 126
4. A citizen of another state brought suit in the United States circuit court of Louisiana, and died; his widow was appointed administratrix in the state of his domicile, and was recognized in Louisiana as tutrix of his minor children. *Held*, that the suit could be revived and prosecuted in her name without her taking out letters of administration in Louisiana. *Thomas v. Parish of Tensas*, 167
5. Courts of law have and habitually exercise control over their own process, so as to prevent injustice and oppression. *Hitchcock v. Galveston Wharf Co.*, 295
6. In Texas it is permissible practice to make an alternative writ of *mandamus* returnable to the same term in which it was issued. *Hitchcock v. Galveston*, 308
7. Service upon the mayor of an alternative writ of *mandamus*, issued in fact against the city, but directed to the mayor and aldermen, is a good service. *Ib.*
8. Where the judgment creditor of a city, in order to satisfy his judgment, had garnished stocks owned by the city more than sufficient to pay it, and the question whether said stocks could be subjected to the payment of the city's debts was still pending on appeal, *held*, that the creditor was not entitled to the writ of *mandamus* requiring the officers of the city to levy and collect a tax to pay his judgment. *Ib.*
9. Where a jury is waived by some of the defendants, and the facts are tried by the court, no judgment can be rendered against another defendant in default for want of an answer, who does not join in the waiver of the jury. *Young v. Dunn*, 331
10. The *bona fide* indorsee of a promissory note who has sued in the same action both the maker and indorser may discontinue the suit as against the indorser, notwithstanding an issue raised by the maker that the indorser obtained the note from him by fraud. *Adams v. Addington*, 389
11. A charge not applicable to any evidence in the case is properly refused. *Einstein v. Gourdin*, 415

PRESCRIPTION.

See LIMITATIONS.

PRESENTATION OF CLAIM.

See INDICTMENT, 2, 3, 5. STATUTES CONSTRUED, 23.

PRIMAGE

Where a charter-party which constituted the contract between the parties made no provision for the payment of primage, none was allowed, although it was stipulated for in the bill of lading. *Carr v. Austin & Northwestern R. R. Co.*, 327

PRIORITY OF PAYMENT.

1. The United States recovered a judgment against three persons. Two of the judgment debtors had been partners, and had as such been adjudicated bankrupt. The judgment was for the individual debt of one of the partners, the two other judgment debtors being his sureties. *Held*, (1) That the United States was entitled to priority of payment out of the partnership as well as individual assets of the partners, over all creditors, whether partnership or individual. (2) That the government is not limited as to its choice of remedies or of funds liable to its claims. Therefore the assumption that the United States ought first to pursue its remedy against the surety, who was not a member of the firm, before coming on the partnership assets, was not tenable. *In re A. & H. Strassburger*, 557
2. Creditors who have not reduced their claims to judgment and have no lien have no right to insist on payment out of any specific property of their debtor. *Swann v. Sanborn*, 625

PRIVILEGES.

See LIENS, 1, 2, 3, 4. PLEDGE, 1, 2.

PROCESS.

See MANDAMUS, 1, 2.

1. The power to control their own process so as to prevent injustice is one which belongs to all courts. *The Sabine*, 83
2. Courts of law have and habitually exercise control over their own process, so as to prevent injustice and oppression. *Hitchcock v. The Galveston Wharf Co.*, 295
3. A state law which authorizes a personal judgment against a non-resident defendant upon the service of process on him outside the limits of the state, is beyond the legislative power, and is null and void. *Parrott v. Alabama Life Ins. Co.*, 853
4. The act of congress (1 Sup. to Rev. Stat., 415), and the acts amendatory thereof (id., 490, 550), in so far as they restrict the return of process in civil cases in the northern district of Texas, to places therein mentioned, apply only to the district and not to the circuit courts. *Pacific R'y Improvement Co. v. Metcalf*, 404

PROOF OF LOSS.

See INSURANCE, 1, 2, 3, 4, 5.

PROXIMATE CAUSE.

A shipper of cotton was allowed by a common carrier to fill up a bill of lading in his own handwriting and leave a space which afforded opportunity for fraudulently increasing the statement of

the number of bales shipped. *Held*, that the forgery of the shipper in raising the bill of lading and not the act of the carrier was the proximate cause of the loss, occasioned by the forgery. *Lehman, Durr & Co. v. Central, etc., R. R. Co.*, 560

RAILROADS.

See COMMON CARRIERS, 2, 3. CONSTITUTIONAL LAW, 13, 14, 15, 16, 17. CORPORATIONS, 5. INJUNCTION, 3. RIGHT OF WAY. STATUTES CONSTRUED, 17.

1. A person receiving injuries by a collision with a train at a railroad crossing must show that the accident occurred without carelessness or default on his part, and that it was brought about by the negligence or misconduct of the servants of the railroad company. *Tucker v. Duncan*, 652
2. Unless the injury is caused by the defendant's gross negligence or wilful act, the plaintiff cannot recover, if his own negligence directly or proximately contributed to produce the result. *Ib.*

REGISTRY.

See CONSTITUTIONAL LAW, 1.

REISSUE.

The specification of an original patent pointed out a certain material to be used, and declared that its sole utility and availability consisted in two of its properties. The reissued patent substituted other materials, naming those only which possessed the same two properties. *Held*, that there was no expansion of the patent, and that the reissue was valid. *Dunbar v. White*, 116

REMOVAL OF CAUSES.

See EXECUTORY PROCESS, 3.

1. An affidavit for the removal of a suit under the third clause of section 639, Revised Statutes, which is made by the attorney of the party, and which states that the party "has reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice" in the state court, and that the party is absent, for which reason the affidavit is made by the attorney, is sufficient. *Hart v. New Orleans*, 165
2. Where a suit was brought in a state court to enjoin an execution on the ground that the judgment had been obtained by fraud, *held*, that it was not a suit merely incidental to the action in which the judgment was rendered, but a new case, which, the parties being citizens of different states, was removable to a court of the United States. *Stackhouse v. Zunts*, 171
3. If a suit is rightfully removed from a state court to a court of the United States, the latter has jurisdiction to grant any relief the case may demand, as fully as the state court could have done had the case not been removed. *Ib.*
4. A party sought to remove a cause pending in a state court on the ground of the citizenship of the parties, which did not appear either by the petition for removal or by the record, but appeared for the first time in a petition for *certiorari* filed in the United States court

- after trial and judgment in the state court. *Held*, that the latter court had properly refused to surrender its jurisdiction, and that upon the filing of the record in the United States court, the proceedings should be dismissed. *Merchants' Bank v. Brown*, 268
5. A defendant to a suit in a state court who moves to quash the service of process upon him, and petitions for the removal of the cause to a court of the United States, and upon such removal renews his motion to quash, does not thereby enter an appearance by which the service of process is made unnecessary. *Parrott v. Alabama Life Ins. Co.*, 358
 6. A suit brought in a state court upon the official bond of a United States marshal, in which the proper construction of the condition of the bond is made a question, is removable to the circuit court of the United States without regard to the citizenship of the parties. *Lawrence v. Norton*, 388
 7. As a general rule (the exceptions noted), where a cause has been removed from a state court to a court of the United States, the latter court cannot enjoin further proceedings in the case by the state court. *Missouri, etc., Railroad Co. v. Scott*, 386
 8. Citizens of the state of Texas claiming to hold laborers' liens upon the property of a railroad company, also a citizen of that state, filed their petition in a state court against the railroad company, asserting their liens and praying for a receiver, etc. Certain other lien holders, citizens of other states, intervened and set up liens against the property of the railroad company, and alleged that their liens were superior to those of the original plaintiffs, and prayed relief accordingly. *Held*, that there was a controversy in this case wholly between citizens of different states, and that the cause was removable. *Snow v. Texas Trunk Railroad Co.*, 394
 9. The suit was begun at the December term of the state court, and a receiver was appointed. At the next (June) term, before any issue joined or trial of the cause between the original parties, certain intervenors filed their interventions, and immediately petitioned for the removal of the cause to the circuit court of the United States. *Held*, that the petition for removal was filed in due season. *Ib.*
 10. An action of trespass brought against a defendant who was United States marshal for acts done by his deputy, in which the defendant pleaded that the alleged trespasses were acts done by him as marshal by authority of a writ issued from a court of the United States, is removable from the state to a United States court. *Ellis v. Norton*, 399
 11. Section 4265 of the code of Texas provides: "No suit pending for or against any railroad company at the time that the sale may be made of its roadbed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company." While a suit was pending in a state court against a railroad company, its property was sold out under a deed of trust, and during such pendency the act of congress of March 3, 1875, for the removal of causes, was passed, and after its passage and before the trustees were made parties, a final judgment was rendered, and afterwards reversed. *Held*, that it was too late for said trustees, they having been made parties defendant, to remove the cause to a court of the United States. *Shirley v. Waco Tap Railroad Co.*, 411
 12. Section 643 of the Revised Statutes authorizes the removal to a United States court of any criminal prosecution commenced in a

state court against any officer acting by authority of the revenue laws of the United States. *Held*, that a prosecution may be considered as commenced, within the meaning of the statute, when a warrant is issued by a competent judicial officer, upon cause shown by affidavit, and the party charged has been arrested and is in custody. *State of Georgia v. Fort*, 513

18. Where two defendants, citizens of different states, were sued in a state court upon a joint bond by a plaintiff who was a citizen of the same state with one of the defendants, *held*, that the other defendant could not remove the cause to a United States court by averring that there was no controversy in the case between him and the plaintiff. *Folsom v. The Continental Bank*, 521

RENTS AND PROFITS.

See EQUITY, 10, 11. EVIDENCE, 4. LIMITATIONS, 5. PLEA IN BAR, 1, 2.

1. A possessor in bad faith is liable not only for rents and revenues and values for use actually received, but also for those which might have been received with ordinary good management. *Gaines v. New Orleans*, 213
2. When a defendant has, in bad faith, kept the plaintiff, who is the true owner, out of possession of her property, known by it to belong to her, its liability is not limited by the redress given against those to whom the possessor in bad faith has sold and warranted the property, but extends to all the loss which she has suffered for the entire period during which she has been kept out of possession. *Ib.*

RESCISSION OF CONTRACT.

On the question of failure of consideration the eviction or decree of nullity must be final before it can constitute a ground of rescission. *Chapman v. Wilson*, 30

RES JUDICATA.

See PLEA IN BAR, 1, 2.

1. The rights of the parties in reference to certain property having been settled by the final decree of the court of last resort, such decree will, in a subsequent litigation between the same parties in reference to the same property, be considered as *res judicata*. *New Orleans, etc., Railroad Co. v. New Orleans*, 1
2. Where, pending a suit, the defendant dies, and his heirs are made parties and judgment rendered against them, the opening of the succession, the administration of the personal property and the homologation of the accounts, before the judgment was rendered, cannot be set up by the heirs as *res judicata* to a bill filed by the judgment creditor to subject the real estate of the decedent to the satisfaction of the judgment. *National Bank of New Orleans v. Bohné*, 74
3. The *stat* of a judge or court, directing executory process to issue on a mortgage given to secure the payment of money, cannot be pleaded as *res judicata* in bar of a suit brought to foreclose the mortgage. *Weaver v. Field*, 152

REVIVOR.

See JURISDICTION, 7. STATUTES CONSTRUED, 16.

- A citizen of another state brought suit in the United States circuit court of Louisiana, and died; his widow was appointed administratrix in the state of his domicile, and was recognized in Louisiana as tutrix of his minor children. *Held*, that the suit could be revived and prosecuted in her name without her taking out letters of administration in Louisiana. *Thomas v. Parish of Tensas*, 167

RIGHT OF WAY.

Where a right of way over private property, or the right of crossing a public highway, has been acquired, certain common rights attach to the acquisition, which may be protected and enforced between proper parties in a court of the United States; but to acquire such rights, resort must be had to the courts of the state. *Missouri, etc., R'y Co. v. Texas & St. Louis R'y Co.* 360

SALE.

See EQUITY, 22. TRUSTS, 1.

1. Under the statutes of Louisiana, a sale made of all the property of a private corporation by order of its board of directors to pay its only debt, and afterwards ratified by the vote of three-fourths of the stock represented in a general meeting of stockholders called to act on the subject, is, in the absence of fraud, valid. *Hancock v. Holbrook*, 52
2. The power of sale conferred on trustees in a deed of trust executed to secure a debt is not suspended by the insanity of the grantor, occurring after the execution of the deed, and a sale made during such insanity will not be avoided, although the insanity of the grantor was known to the trustees and the beneficiary of the deed. *Haggart v. Ranger*, 403
3. Such sale, if made in pursuance of the directions of the deed of trust, will not be set aside on the ground of inadequacy of price, no fraud being charged. *Ib.*
4. When the common council of a city had practically agreed upon the purchase of a fire engine, the fact that the mayor was paid by the seller for circulating among the tax-payers a petition in favor of the purchase, there being no concealment, and no corruption being shown, did not avoid the sale. *Bridgford v. The City of Tusculumbia*, 611
5. The fact that the purchaser at a tax sale was the deputy of the sheriff by whom the sale was made, does not render the sale *ipso facto* void, when it is not shown that the deputy had any part in making the sale, and there is no suggestion of any unfair practice or *mala fides* on his part in reference thereto. *O'Reilly v. Holt*, 645
6. The naked fact that the purchaser at a tax sale is clerk of the chancery court, in whose office the deed, to have effect, must be filed on the day of sale, does not render the sale absolutely void. *Ib.*

SALVAGE.

See ADMIRALTY, 36, 37, 38, 39.

1. The services of boats equipped with steam pumps and other apparatus for the extinguishment of fires upon vessels, in putting out a

- fire upon a ship moored at the levee in New Orleans, are salvage services. *The Sultote*, 19
2. The amount of salvage to be allowed depends on the extent and danger of the salvage service, the risk to which the vessels and other property employed in the service are exposed, the value of the property saved, and the imminence of the peril by which it is threatened. *Ib.*
 3. Salvage should be regarded in the light of compensation and reward and not of prize, and should not exceed what is necessary to insure the most prompt, energetic and daring effort at rescue. *Ib.*
 4. A fire upon a vessel loaded with cotton and moored at a wharf, the vessel, cargo, etc., being valued at \$250,000, having been extinguished with little exertion and little risk to the salvors and their craft, eight per cent. on the value of the vessel, cargo, etc., was allowed as salvage. *Ib.*
 5. In the distribution of salvage earned by steam vessels equipped for the extinguishment of fires, and their officers and crew, the men were allowed a certain number of months' wages, graduated in some degree by the services rendered by the vessels respectively. *Ib.*
 6. The amount paid for procuring, compressing and loading a cargo of cotton should contribute to the salvage earned in extinguishing a fire upon a vessel before her voyage had actually commenced. *Ib.*
 7. In the distribution of salvage in this case, regard was had to the fact that the value of the aid rendered by one of the salvor's vessels was enhanced by the fact that she was specially designed and equipped for the extinguishment of fires, and was always ready and powerfully efficient for that purpose. *Ib.*
 8. Where a steamboat worth about \$35,000 or \$40,000 moored to the wharf in the port of New Orleans, and with only a watchman on board, on a dark night and in a gale of wind broke from her moorings, and being without steam or other propelling power, drifted down the river to the peril of herself and other shipping, and the watchman on board rang his bell for assistance, which was rendered by two tugs, and the steamboat was towed by them with much trouble, and some risk to themselves and crews, to a place of safety: *Held*, that the service was a salvage service, and that \$300 was a reasonable allowance therefor. *The Henry Frank*, 127
 9. A raft of timber afloat and in peril upon a public navigable water may be libeled in a court of admiralty for salvage services. *A Raft of Timber*, 197
 10. When the services of salvors conduce to the saving of the property imperiled, but would have been unavailing without other aid, and the salvage service is completed by other salvors, *held*, that the first set of salvors is entitled to compensation. *Ib.*
 11. A floating dry dock, which was a wooden box which had been securely and permanently fastened for fourteen years to the bank of a navigable stream, which was used solely for the purpose of docking vessels for inspection and repair, which had no means of self-propulsion, and was practically incapable of being navigated, could not be the subject of salvage services, and a libel therefor against the owner would not lie in the admiralty. *Cope v. Vallette Dry Dock Co.*, 265

SATISFACTION.

See GIVING IN PAYMENT. SATISFACTION BY INSURERS.

SATISFACTION BY INSURERS.

It is no defense to a libel brought against the vessel in fault to recover damages caused by a collision that the owners of the injured vessel have been satisfied by the insurers for the damages sustained by her. *The Yeager*, 18

SEAMAN.

See ADMIRALTY, 14, 15, 16.

SEAMAN'S WAGES.

See ADMIRALTY, 14, 15, 16, 86, 89.

SEAWORTHINESS.

1. A vessel is seaworthy when her hull, tackle, apparel and furniture are in such condition of strength and soundness as to resist the ordinary action of the sea, wind and waves during the contemplated voyage. *The Orient*, 255
2. When a vessel was shown to have been seaworthy for the two years next preceding the voyage on which she was wrecked, and she was wrecked in a cyclone of great violence, *held*, that the burden was cast on the insurers to prove her unseaworthy *Ib.*

SERVICE.

See MANDAMUS, 1, 2. PROCESS, 8. SUBPCENA IN CHANCERY.

SITUS OF PERSONAL PROPERTY.

See TAXATION, 2.

STATUTES CONSTRUED.

See BANKRUPTCY, 5. CIVIL RIGHTS. CONSTITUTIONAL LAW, 11, 12, 13, 14, 17, 18. INDICTMENT. JURISDICTION, 7, 17. LIENS, 2, 8. REMOVAL OF CAUSES, 1. STOCKHOLDER, 2.

1. Under the statutes of Louisiana, a sale made of all the property of a private corporation by order of its board of directors to pay its only debt, and afterwards ratified by the vote of three-fourths of the stock represented in a general meeting of stockholders called to act on the subject, is, in the absence of fraud, valid. *Hancock v. Holbrook*, 52
2. Article 1013 of the Civil Code of Louisiana, which makes an heir who has accepted the estate liable for the debts of the succession, unless, before acting as heir, he files an inventory of the succession, or accepts with benefit of inventory, does not apply when a full inventory of the effects of the succession has been made and filed by a tutor who has administered them. *National Bank of New Orleans v. Bohne*, 74
3. Under the act of the legislature of Louisiana, entitled "An act to authorize the consolidation of business or manufacturing corporations or companies," approved December 12, 1874, the Crescent

- City Gas Light Company, incorporated in 1870, with the exclusive franchise of making and vending gas in New Orleans for fifty years, beginning April 2, 1875, could not be consolidated with the New Orleans Gas Light Company, incorporated in 1835, with the exclusive franchise of making and vending gas in New Orleans until April 1, 1875, when its charter expired. *New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, 90
4. A seizure, confiscation and condemnation of real estate, under the act of August 6, 1861, entitled "An act to confiscate the property used for insurrectionary purposes" (12 Stat., 819; Rev. Stat., sec. 5308), divested the title of the owner to the fee simple. *Kirk v. Lewis*, 100
 5. The statute of Louisiana, which, in case of wrongfully caused death, continues to the next of kin the right of action for the damages inflicted on the deceased person, was intended to establish a rule of survivorship for the government of the community who constitute the state of Louisiana, and could not include a cause which does not concern its inhabitants, or did not originate within its territory; and it could not, in such latter case, give a lien or authorize an action against a vessel. *The E. B. Ward, Jr.*, 145
 6. The fraudulent addition by the officers of an election for representative in congress, to an incomplete list of the voters required by law to be kept by them of the names of persons not voting, with intent to affect said election, is an offense against section 5515 of the Revised Statutes. *United States v. Bader*, 189
 7. Under the act of the legislature of Alabama by which John Grant was authorized to excavate a channel between Dauphin Island and Cedar Point, in the county of Mobile, and to exact tolls from all such boats or vessels as might go in or out of said channel, a tug is not liable for tolls on the boats or vessels towed by her through said channel. *The Fox*, 199
 8. The bankrupt act of 1867 does not authorize the institution of proceedings against the individual estate of a deceased person. *Adams v. Terrell*, 337
 9. An act of the legislature of Texas which recognizes the existence of a corporation organized under the laws of Kansas, and confers upon it within the state of Texas the same rights and powers as were granted it by the state of Kansas, within its territory, but does not purport to create a new corporate body, is merely an enabling act, and does not make such corporation a corporate body or citizen of the state of Texas. *Missouri, etc., Ry Co. v. Texas & St. Louis Ry Co.*, 360
 10. Articles 4256 and 4257, Revised Statutes of Texas, which establish reasonable maximum rates to be charged by railroad companies for the transportation of passengers and freight, do not apply to fares of express messengers or the freights of express matter. *Texas Express Co. v. Texas & Pacific Ry Co.*, 370
 11. The jurisdiction of the courts of the states to punish the passing, etc., of counterfeit coin with intent to defraud has not been excluded, but has been reserved and recognized, by the legislation of congress. *Ex parte Geisler*, 381
 12. By the statute law of Texas, when a suit is brought against a railroad company to enforce a laborers' lien, lien holders, other than the plaintiffs, have the right to intervene without leave of the court. *Snow v. Texas Trunk Railroad Co.*, 394

13. When such other lien holders had applied for leave to intervene, which had been refused, and had, without leave, filed petitions asserting their liens, they thereby became parties to the suit. *Ib.*
14. The act of congress (1 Sup. to Rev. Stat., 415), and the acts amendatory thereof (id., 490, 550), in so far as they restrict the return of process in civil cases in the northern district of Texas, to places therein mentioned, apply only to the district and not to the circuit courts. *Pacific R'y Improvement Co. v. Metcalf,* 404
15. A deed of assignment by which all the property of the assignee, not subject to forced sale, is conveyed to a trustee in trust to pay the proceeds thereof *pro rata* among such creditors of the assignor as should receive the sums so paid in satisfaction of their claims, and the residue, if any, to the assignor, is fraudulent and void under the laws of Texas. *Lawrence v. Norton,* 406
16. Section 4265 of the code of Texas provides: "No suit pending for or against any railroad company at the time that the sale may be made of its roadbed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company." *Held,* that when, pending a suit against a railroad company, its property, etc., was sold out under a deed of trust, and its trustees were made parties defendant to the pending suit by virtue of said section, there was no abatement or revivor of the suit, nor was there the beginning of a new suit. *Shirley v. Waco Tap Railroad Co.,* 411
17. Under the legislation of Georgia the rights, privileges and franchises of the Savannah, Florida & Western Railway Company are subject to alteration or withdrawal at the will of the legislature. *Tilley v. The Railroad Commissioners,* 427
18. The act of the legislature of Georgia entitled "An act to provide for the regulation of freight and passenger tariffs in this state," etc., passed October 14, 1879, does not revoke any of the privileges or immunities of said railway company in such manner as to work injustice to its corporators or creditors, and is therefore not in violation of paragraph 3, section 3, article 1 of the constitution of the state. *Ib.*
19. No penalty is prescribed by section 5467 of the Revised Statutes for the offense of embezzling a letter with valuable contents, by a person in the postal service of the United States. *United States v. Long,* 454
20. Under the code of Georgia, a draft drawn and indorsed by a married woman to pay the debt of her husband is absolutely void, even in the hands of a *bona fide* holder for value, and in a suit thereon the wife is not estopped to set up such defense by the fact that the draft recites that it was drawn for money loaned to her for her own benefit. *March v. Clark,* 460
21. A defendant charged with the offense of smuggling submitted to the court his petition, verified by affidavit, showing that witnesses material to his defense were beyond seas, and praying for a *dedimus potestatem* to take their depositions, by virtue of section 866 of the Revised Statutes. *Held,* that the writ should issue, the question of the admissibility of the depositions being reserved till the trial. *United States v. Wilder,* 475
22. The filling of a vacancy in the office of district attorney or marshal, by a circuit justice, under authority of section 798, Revised Statutes, does not preclude the president from making an appointment to the same office during a recess of the senate. *In re Farrow and Bigby,* 491

23. Section 1996 of the code of Georgia does not apply to mortgages.
Winstead v. Bingham, 510
24. Section 643 of the Revised Statutes authorizes the removal to a United States court of any criminal prosecution commenced in a state court against any officer acting by authority of the revenue laws of the United States. *Held*, that a prosecution may be considered as commenced, within the meaning of the statute, when a warrant is issued by a competent judicial officer, upon cause shown by affidavit, and the party charged has been arrested and is in custody. *State of Georgia v. Port*, 513
25. Under the constitution and laws of Georgia, a justice of the peace, when acting in his judicial capacity, is a court. *Ib.*
26. An act of the legislature of Georgia, which provided that a certain railroad company of that state should have power to sell its road within the state of Georgia to any railroad company of another state which might, by the laws thereof, be authorized to purchase the same, and that such company so buying should have all the rights and privileges of the said company so selling, does not, on the purchase of said railroad by such railroad company of another state, make the latter a corporation of the state of Georgia. *Morgan v. East Tennessee & Virginia R. R. Co.*, 523
27. The marshal is, within the meaning of section 5438, Revised Statutes, an officer to whom it is an offense, punishable by that section, for a deputy marshal to present for approval a false claim for fees. *United States v. Strobach*, 592
28. The presentation for approval to a district court of the United States of a claim against the government of the United States is a presentation to an officer in the civil service of the United States, within the meaning of section 5438, Revised Statutes. *Ib.*
29. A libel of information filed for the forfeiture of goods, etc., for violation of the customs revenue laws, which does not aver an intent to defraud the United States, is bad. *United States v. Ninety Demijohns of Rum*, 637
30. A demijohn containing over four gallons is not a bottle, within the meaning of schedule D, section 2504, of the Revised Statutes, which requires that "wines, brandies, etc., imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package." *Ib.*
31. The word "timber" as used in section 2461, Rev. Stat., includes all such growing trees, without regard to their size, as might be or become of use in any kind of construction or manufacture. *United States v. Stores*, 641
32. The use to which a party has put the timber unlawfully cut by him upon the public lands does not relieve the act of unlawful cutting of its criminal character. *Ib.*
33. It is an offense under section 2461, Rev. Stat., for any third person to cut timber upon public lands entered for homestead. *Ib.*
34. An act of the legislature of Mississippi, passed November 27, 1875, which levied a uniform tax of ten cents per acre per annum for levee purposes on all lands in certain counties in the state, and directed, without further notice to the owner, a sale on a specified day of all lands on which the tax had not been paid when due, is not in violation of section 13 of the bill of rights of the constitution of Mississippi, which prohibits the taking of private property for public use without just compensation; or of section 10, which

- declares that a citizen shall not be deprived of his life, liberty or property but by due process of law. *O'Reilly v. Holt*, 645
35. The owner of land sold for levee taxes under the act above mentioned can redeem the same only upon the payment of the purchase money with all subsequent taxes due thereon, and fifty per cent. per annum interest on the whole amount. *Ib.*
 36. An incumbrancer who holds a lien upon the undivided two-thirds of lands sold for levee taxes cannot redeem by the payment of two-thirds of the sum necessary to redeem the whole estate. *Ib.*
 37. The purchaser of the land at a levee tax sale is entitled, on the redemption of the land by the owner, to all subsequent taxes paid by him, and fifty per cent. per annum interest thereon, although he has paid said taxes in scrip which he acquired at a discount. *Ib.*

STATUTE OF FRAUDS.

See CONTRACTS, 3.

STOCK.

See PLEDGE, 1, 2. STOCKHOLDER.

STOCKHOLDER.

1. A person who purchases the stock of a national bank with his own means and for his own account, but has it transferred on the books of the bank from the seller to a third person, does not thereby escape the liability of a stockholder for the debts of the bank. *Case v. Small*, 78
2. The charter of a mutual life insurance company, organized under the laws of Missouri, provided that upon its dissolution all its property should vest in an officer of that state, who should wind up its affairs. *Held*, that all policy-holders were members of the corporation and had assented to this provision, and that those residing in Louisiana were entitled to no priority of payment out of the assets of the corporation in that state, or to have them retained in the hands of a receiver as security for the amounts due them; but that such assets must be turned over to the officer appointed under the laws of Missouri to settle the affairs of the company. *Rundell v. Life Association of America*, 94

SUBPOENA IN CHANCERY.

See PRACTICE IN EQUITY, 3.

Upon a bill to impeach a judgment at law and for a new trial, a substituted service of subpoena was ordered. *Held*, (1) That the case was one in which substituted service was proper, and the court would proceed without actual service of subpoena on defendant. *Oglesby v. Attrill*, 114

SUCCESSION.

See ESTATES OF DECEASED PERSONS.

SUMMONS.

See WRIT.

SURETY.

See PLEA IN BAR, 4.

TAXATION.

1. A court having rendered judgment against a municipal corporation has jurisdiction to protect the judgment from all illegal procedures, under the pretext of taxation or otherwise, by which the judgment debtor seeks to assert a lien thereon, or reduce its amount. *De Vignier v. New Orleans*, 208
2. Unless otherwise provided by law prior to their issue, municipal bonds have their *situs* where their owner resides, and when owned by non-residents of the state cannot be constitutionally subjected to taxation; either by the state or the municipality which issued them. *Ib.*
3. Legislation which abrogates or limits the power of taxation granted to a municipal corporation, upon the faith of which contracts were made by it, and without which they cannot be enforced, is invalid and void. *United States ex rel. v. Port of Mobile*, 586

TAX SALE.

See SALE, 5, 6.

TEXAS.

See ACTION AT LAW, 1. CONTRACTS, 8. ELECTORS. STATUTES CONSTRUED, 9, 10, 12, 18, 16. TRESPASS TO TRY TITLE.

"THIRD PERSONS."

See CONSTITUTIONAL LAW, 1. LIENS, 2.

TIMBER.

See STATUTES CONSTRUED, 81.

TOLLS.

See STATUTES CONSTRUED, 7.

TOWAGE.

See ADMIRALTY, 12.

TRADE-MARK.

The sale by a person engaged in manufacturing certain goods of the right to use his name as a trade-mark, will be valid, provided the trade-mark is not used to deceive the public; and a sale of the right to use such trade-mark by the vendee to another person will not be affected by any contract between the original parties of which the second vendee had no notice. *Oakes v. Tonsmierre*, 547

TREATIES.

The courts of the United States take judicial notice of the public treaties between the United States and foreign countries. *Lacroix v. Sarrazin*, 174

TRESPASS.

See ACTION AT LAW, 1. TRESPASS TO TRY TITLE.

TRESPASS TO TRY TITLE.

1. In an action of trespass to try title brought in a court of the United States sitting in the state of Texas, the plaintiff cannot recover on an equitable title. *Young v. Dunn*, 331
2. A defendant in an action of trespass to try title who does not claim title through or under the plaintiff cannot be estopped by the declarations of plaintiff or any person under whom he claims. *Ib.*

TRUST DEED.

See DEED OF TRUST.

TRUSTEES.

See EQUITY, 23, 28.

TRUSTS.

1. A private corporation bought on credit all its property, for which one of its stockholders became bound. He failed to pay the debt when it became due, and by vote of the directors the property was sold to a third person in satisfaction thereof, and he sold it on credit and conveyed it to said stockholder. *Held*, there being no fraud shown, that the purchaser did not take the property subject to a trust in favor of another stockholder, in proportion to the amount of the latter's stock in the company, when it appeared that the inability of the first mentioned stockholder to pay the debt was caused by the unwarranted defection and withdrawal from the business of the company of the stockholder in whose behalf the trust was set up. *Hancock v. Holbrook*, 52
2. A city claimed title to a portion of the water front of its harbor by virtue of an act of the legislature, and its title thereto had been affirmed by the supreme court of the state. It claimed another portion by virtue of the dedication of the original proprietors. A litigation between the city and an incorporated wharf company touching the title to the harbor front was compromised by a consent decree, by which the city was invested with title to one-third of the stock in the wharf company. The compromise was approved by an act of the legislature, which declared that the stock should be held by the city as trustee for its present and future inhabitants, and should be exempt from sale for the city's debts. *Held*, that the stock could not be seized and sold for the debts of the city. *Hitchcock v. The Galveston Wharf Co.*, 295

TUTORS.

See ESTATES OF DECEASED PERSONS, 1.

ULTRA VIRES.

See EQUITY, 26.

UNITED STATES.

See PRIORITY OF PAYMENT.

UNITED STATES ATTORNEY.

See VACANCY IN OFFICE, 1, 2.

VACANCY IN OFFICE.

1. Section 2 of article II of the constitution of the United States, which declares that "the president shall have power to fill up all vacancies which may happen during the recess of the senate," authorizes the president to fill a vacancy which happened during the session of the senate, and continued to exist after the senate had adjourned. *In re Farrow and Bigby*, 491
2. The filling of a vacancy in the office of district attorney or marshal, by a circuit justice, under authority of section 793, Revised Statutes, does not preclude the president from making an appointment to the same office during a recess of the senate. *Ib.*

VENIRE FACIAS.

1. A writ of *venire facias* is, under the statutes of the United States, indispensable to the summoning of a legal grand jury. *United States v. Antz*, 174
2. A paper writing purporting to be a writ of *venire facias*, which is directed to the marshal of the United States for the district of Louisiana, there being no such officer or district, and which is tested in the name of the deputy clerk of the court, and not in the name of the chief justice of the supreme court, is not a writ of *venire facias* or any process in the nature of that writ. *Ib.*

WAIVER.

Where a jury is waived by some of the defendants, and the facts are tried by the court, no judgment can be rendered against another defendant in default for want of an answer, who does not join in the waiver of the jury. *Young v. Dunn*, 881

WARRANTOR.

See POSSESSOR IN BAD FAITH, 2, 3.

- A judgment is binding on a warrantor if he has been called in warranty, or has been apprised of the bringing of the suit. *Gaines v. New Orleans*, 213

WARRANTY.

See GIVING IN PAYMENT, 1, 3, 4. WARRANTOR.

WHARFAGE.

1. The exaction of unreasonable and exorbitant wharfage is not the laying of a duty of tonnage. *Ouachita Packet Co. v. Aiken*, 208
2. An ordinance and contract by which a city farmed out its wharves to private individuals, and prescribed the rates of wharfage which

they might exact, are not a regulation of commerce with foreign nations and among the several states in derogation of the exclusive power of congress over that subject. *Ib.*

3. As long as congress has passed no law regulating wharfage, the courts of the United States have no jurisdiction to abrogate state laws on the subject, on the ground that the rates of wharfage allowed are unreasonable and exorbitant. *Ib.*

WRIT.

See VENIRE FACIAS, 1, 2. MANDAMUS, 1, 2.

When a contract provides that suit shall not be brought on it till the expiration of a specified time, the issue of the writ is the commencement of the suit. *Gauche v. London & Lancashire Ins. Co.*, 102



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